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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 655

C. H. ACKER, DOING BUSINESS AS C. H. ACKER & COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

OPINIONS.

The decision of the majority of the District Court for the Northern District of Illinois, Eastern Division (Circuit Judge Alschuler, District Judge Barnes) appears in the record (Vol. II), beginning at page 1162. The separate opinion of District Judge Wilkerson appears in the same volume at page 1170.

THE STATUTES INVOLVED.

The provisions of law which authorize the Secretary of Agriculture to regulate the charges of market agencies (a person engaged in the business of buying or selling live stock on a commission basis or furnishing stockyard services) are found in Packers and Stockyards Act, 1921, Title 7, Chap. 9, U. S. Code (Sections 201-217). These sections of the statute appear as Appendix A to this brief. The analogy of the Packers and Stockyards Act to the Interstate Commerce Commission Act is such that provisions for court review of the orders of the Interstate Commerce Commission are in terms made applicable to court review of Orders of the Secretary (Title 7, Chap. 9, Sec. 217). The applicable provisions of the law relating to the suspending or restraining the enforcement of orders of the Interstate Commerce Commission made by Section 217 also applicable to suspending or restraining the enforcement of orders of the Secretary of Agriculture under Packers and Stockyards Act, 1921, are found in Title 28, U. S. Code, Section 43 to Section 47a. Section 47 is particularly applicable. These provisions relating to court review of orders both of the Interstate Commerce Commission and of the Secretary of Agriculture appear as Appendix B to this brief.

Section 345, Title 28, U. S. Code (Judicial Code, Section 238 amended) provides that the Supreme Court has appellate jurisdiction to review the final decree of a District Court as provided in Section 47 of Title 28, referred to above.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The appellants intend to urge each of the assigned errors (R. Vol. II, pp. 1174-8). The assignments of error to comply with the particularity required are numerous but fall into groups such as those charging that the findings of the Secretary of Agriculture and of the Court are not supported by the evidence and such as those charging that the rates prescribed by the Secretary are arbitrary, unreasonable and confiscatory of the property of each of the petitioners.

The Assignments of Error are classified in the Statement of Points to Be Relied Upon (R. Vol. II, p. 1184).

STATEMENT OF THE CASE

The appellants are market agencies registered under Packers and Stockyards Act, 1921, engaged in selling or buying livestock on a commission basis at the Union Stock Yards, Chicago, a stockyard which has been ascertained by the Secretary of Agriculture to be a stockyard as defined in the Act and which has been posted as such. The action is brought against the United States of America; Henry A. Wallace, Secretary of Agriculture; Homer S. Cummings, Attorney General; and Michael Igoe, United States District Attorney for the Northern District of Illinois.*

The action was brought pursuant to the provisions of Packers and Stockyards Act, 1921, and Sections 43 to 47a of U. S. Code, Title 28. And its purpose was to restrain the execution and enforcement of Orders of the Secretary of Agriculture dated January 8, 1934, and March 12, 1934.

Jurisdiction and venue of the District Court, which was admitted by answer (R. Vol. I, p. 198), arose from the statutes identified; and also because the action was a suit of a civil nature wherein the matter in controversy exceeds the sum of Three Thousand Dollars ($3,000) exclusive of interest and costs and arises under the Constitution or laws of the United States, the correct decision depending, in whole or in part, upon the construction and application of the Constitution of the United States, particularly the Fifth Amendment thereof.**

The Secretary of Agriculture on September 23, 1932, issued an order of inquiry and notice of hearing directing

* By order dated July 13, 1935, Michael Igoe was substituted as a party defendant in lieu of Dwight H. Green, his predecessor as District Attorney (R. Vol. II, p. 1178).

** The petition and complaint of the appellants was filed April 18, 1934. It is erroneously stated in the record that it was filed Jan. 31, 1935. The complaint begins at p. 1 of Vol. I of the record.

that an inquiry be made for the purpose of determining the lawfulness of the rates and charges of the appellants (R. Vol. I, p. 67). The rates challenged had been in effect since 1923. After the enactment of the Packers and Stockyards Act, 1921, instead of resorting to the formal procedure provided for in that Act, a stipulation was entered into between the Chicago Live Stock Exchange (a voluntary association of which most of the appellants are members), and the Secretary of Agriculture, providing that Howard M. Gore, in charge of the trade practice division of the Packers and Stockyards Administration, and G. N. Dagger, in charge of the division of rates and charges of the Packers and Stockyards Administration, should act as arbitrators in the settlement of rates to be charged (R. Vol. I, p. 29). Subsequently the arbitrators lodged their award with the Secretary of Agriculture on July 31, 1923 (R. Vol. I, p. 33), which award was approved by the then Secretary of Agriculture (R. Vol. I, p. 57).

The rates made and recommended by the arbitrators (R. Vol. I, pp. 44-47) with immaterial changes, continued to be the rates charged at the Chicago yards and were in effect at the time of the Secretary's order of inquiry and notice of hearing. The schedule of such rates is shown as Exhibit B-1 to the Petition and Complaint (R. Vol. I, p. 57 *et seq.*).

As a result of the Secretary's order of inquiry of September 23, 1932, hearings were had in Chicago and in Washington. Most of the leading salesmen of cattle, hogs and sheep, of the Chicago market, who were both owners and employees, were called and testified either on behalf of the appellants or the Government. Order buyers, yard and office employees of the appellants likewise testified. Accountants were called by the Government and introduced into evidence audits and statistical data covering the business

transacted by the appellants during 1931 and 1932. A Government accountant also introduced a cost study prepared by him covering the actual experience of each of the appellants as to income, expenses and volume of sales. An accountant of the appellants also introduced into evidence data showing the costs and experience of each of the appellants and the performance of each firms' salesmen.

On January 8, 1934, the Secretary issued his findings of fact, conclusion and order (Exhibit C to Petition, R. Vol. I, p. 62, *et seq.*). Upon the basis of the findings made by the Secretary, he prescribed a schedule of rates and charges (R. Vol. I, pp. 185-189). On February 7, 1934, the appellants filed with the Secretary of Agriculture a petition for rehearing alleging in substance that the schedule of rates and charges prescribed in the Secretary's order would cause reductions in revenue which would make it impossible for the appellants to pay necessary operating expenses, thereby curtailing the efficiency of the service rendered; that there had been increases in expenses resulting from the operation of the National Recovery Act and Agricultural Adjustment Act; that the schedule of rates and charges prescribed by the Secretary was inequitable in that the rates prescribed were not related to the cost of rendering service; that the appellants desired to show that a draft is a more equitable basis than a consignment for the assessment of rates and charges; that during 1933 substantially all of the appellants operated at a loss; that direct sales of live stock to packers were increasing; that the rates prescribed by the Secretary would necessitate throwing out of employment a large number of people; and that the conditions which prevailed during 1933 constituted a greater change than has occurred during any twelve months period prior thereto. (R. Vol. I, p. 190).*

* The petition for rehearing filed February 7, 1934, is filed in this Court as a physical exhibit.

The foregoing petition for rehearing was denied by the Secretary of Agriculture on March 12, 1934, in his Supplemental Order (R. Vol. I, pp. 189-191). By the same Order, the Secretary made some modification of the rates prescribed by his Order of January 8, 1934, the modified schedule being shown in Volume I of the Record, pp. 191-195.

Before the effective date of the Order of March 12, 1934, and on April 9, 1934, the appellants filed a second or amended petition for rehearing (R. Vol. I, p. 10). In this petition for rehearing it was alleged that the rates and charges prescribed by the Order and Supplemental Order of the Secretary would create a net reduction of 25 per cent of gross income as compared with the income derived from the rates of 1923; that such reduction in income would be confiscatory because the income to be produced by the schedules of the Order and the Supplemental Order would not produce gross income sufficient to pay the necessary and usual costs of doing business; that the Order and Supplemental Order and the schedules thereof were based on findings for the years 1931 and 1932, while during the years 1933 and 1934, decided and profound economic changes had occurred adversely affecting the market agencies at Chicago; that legislation of Congress and the rulings and activities of administrative agencies of the Government, particularly the Agricultural Adjustment Administration, had brought about drastic reduction in the production and marketing of livestock, particularly hogs.*

The petition for rehearing filed April 9, 1934, was denied by the Secretary of Agriculture within three days and the Order of January 8, 1934, and the Supplemental Order of March 12, 1934, were ordered into effect on April 20, 1934 (R. Vol. I, p. 10).

Before the effective date of the rates prescribed, the

*The amended petition for rehearing filed April 9, 1934, is filed in this Court as a physical exhibit.

appellants, on April 19, 1934, secured from the District Court, three Judges sitting as a Statutory Court, an interlocutory injunction (R. Vol. I, pp. 195-7). By the terms of the injunctional order, the appellees were restrained from interfering with the collection of the rates then and since 1923, in force. It was also provided in the Order (R. Vol. I, p. 197) that the appellants impound with the Clerk of the Court the amount by which the charges collected under the schedule of rates in effect exceeded the amount which would have been collected for the same period under the rates prescribed by the Secretary of Agriculture, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts were collected.

Upon final hearing, the Bill of Complaint was dismissed by decree dated March 19, 1935 (R. Vol. II, pp. 1171-2). The decree provided that if an appeal should be taken within thirty days (which was done), the interlocutory injunction should continue in effect pending the appeal, appellants in the meantime to impound with the Clerk of the Court, amounts by which the rates and charges collected, exceeded the rates and charges prescribed in the Orders of the Secretary of Agriculture.

THE RECORD

The record in this case comprises, among other things, the bill (R. Vol. I, p. 1) and answer (R. Vol. I, p. 197); a narrative statement of the evidence before the Secretary of Agriculture (R. Vol. I, p. 297); the narrative statement of evidence before the Statutory Court (R. Vol. I, p. 211); the Findings, Conclusions and Orders of the Secretary of Agriculture (R. Vol. I, pp. 62-195).

ANALYSIS OF THE PLEADINGS

The issues in the case, we believe, can be shown clearly by an analysis of the petition and complaint, and the answer. The petition is divided into six sections which are here abstracted briefly and severally with the admission or denial of the answer indicated.

Section I.

This section identifies the parties and sets up the jurisdiction and venue of the court (admitted). The general charges made are that the Order and Supplemental Order of the Secretary of Agriculture are arbitrary, capricious and unreasonable and without, and contrary to, evidence adduced before the Secretary; and that said Orders are confiscatory of the property and business of the petitioners and if put into effect will deprive the petitioners of their property without due process of law in violation of the Fifth Amendment (denied).

The history of the Chicago Union Stock Yards is set up. Also that Chicago yards furnish the basic market for livestock in the United States and even throughout the world (admitted); that the prices prevailing at the Chicago market establish and govern world prices (admitted); and that live stock is received from 45 states of the Union (admitted).

It is alleged that after the enactment of the Packers and Stockyards Act in 1921, a schedule of rates and charges was established in 1923 by arbitration. The rates then adopted as a result of the arbitration have been in effect without substantial change ever since 1923 (all admitted). Substantially all of the appellants operated at a loss in 1933 under the 1923 rates, despite salary reductions and other economies (denied).

The proceedings before the Secretary under his order of inquiry, his Findings, Conclusions and Order containing the proposed new rates, the two petitions for rehearing and the denials thereof, the issuance of the Supplemental Order of March 12, 1934, containing a slightly modified schedule, and the determination of the Secretary to enforce his orders unless restraints are set up and described (all admitted).

Section II.

This section describes the business of the appellants. The service is buying and selling livestock for producers and shippers thereof. That service is invaluable to the agricultural industry. Roughly one-half of the hogs and one-third of the cattle and sheep marketed in central markets pass through the Chicago Union Stock Yards and are sold by the appellants and others similarly situated. Upon the arrival of livestock at the Stock Yards, the company operating the yards unloads the cars or trucks, furnishes the necessary feed, and except in the case of sheep the appellants make their own delivery to pens assigned to them by the Stock Yards company. The stock is then sold by the appellants, who are commission merchants or agents.

To conduct the business of the appellants, skilled and experienced salesmen are required to grade the livestock, to furnish to customers advices as to prices and in the matter of purchasing and feeding and time of marketing. The appellants, whether individuals, partnerships or corporations, conduct a personal service business. In the case of corporations the owners usually are the directing heads and themselves render the services of selling and buying on order. The selling of livestock on a commission basis requires skill and judgment in the evaluation of price factors and in the grading and classification of livestock. Knowledge of market conditions, of supply and demand, and the ability to

exercise a judgment as to trends and future conditions are essential. The salesmen of the appellants and the appellants themselves as entrepreneurs render services which are essentially personal and professional. The business of the appellants is essentially a cash one and capital investment is small. The principal item of cost is that of salesmen's salary. Salesmen, because of the personal and professional character of their services, because of the skill and judgment required of them, and because of the clientele following which they possess, demand and are entitled to compensation commensurate with the nature of their skill, judgment, responsibilities and services.

The Chicago Live Stock Exchange is a trade association maintained by the appellants and other market agencies.

The service and business of the market agencies is a highly competitive one. Any shipper may avail himself, either of the services of one of the appellants; or co-operative commission agencies; or he may, if he desires, offer his live stock for sale in person.

The volume of sales of livestock made directly to meat packers is increasing. There are at least six other stockyards in the central market area, besides numerous packer concentration stations. The shipper is thus offered a choice of methods of selling his livestock and of the compensation that he shall pay therefor. The appellants must at all times and during any market day of the year be ready to convert arriving live stock into cash, and on the same or on the following day pay the producer or shipper for his consignment. It is necessary that the appellants acting as salesmen or managers or their employed salesmen, their yard men and office staff be on duty continuously regardless of season or regardless of volume of business. Salesmen particularly must be employed by the year. The business of the appellants cannot be conducted on a piecework basis.

All of the allegations of Section II of the Bill are admitted except that it is denied that the services of all the appellants are necessary; except that it is denied that appellants do not enjoy a monopoly; and except for the denial that salesmen must be employed by the year.

Section III.

This section of the bill charges generally that the rates prescribed by the Secretary of Agriculture in his Order of January 8, 1934, and in his Supplemental Order of March 12, 1934, are unreasonable and arbitrary and are contrary to the evidence and without evidence upon which they are purported to be based; and that they are unreasonably and arbitrarily arrived at by guess and supposition rather than by any well-known and well-recognized statistical methods such as modal method, the bulk-line method, the weighted average method, or percentage deviations therefrom. The particulars in support of these charges are then set forth specifically in the bill. They are, of course, denied by the answer. One of the most important particulars is that the costs found to be reasonable by the Secretary are below actual costs. The principal element of costs is the salary paid to salesmen; and one of the primary issues in this case is whether the Secretary of Agriculture has power to determine the amount of salary which a market agency cannot exceed in compensating its salesmen. There is no question of fraud or bad faith involved; the sole question is whether the Secretary can constitute himself the manager or board of directors of a market agency and by administrative fiat determine the maximum salaries of employees, particularly salesmen. It is not deemed necessary to recite here the particulars upon which the charges of unreasonableness and lack of factual foundation are made. Of necessity they must be discussed in the argumentative portion of this brief.

Section IV.

This section of the bill is devoted to the charges of confiscation of property and the deprivation of business and property without due process of law. The experiences of the market based upon aggregate figures for all of the appellants are given with particularity. It is charged that even under the present rates the appellants lost approximately $300,000 in 1932; and that if the rates prescribed by the Secretary had been in effect during the year 1932 the loss to the appellants would have been increased to over $1,000,000. It is charged that the rates prescribed would have caused a reduction of 25.47% in gross actual selling commissions in 1932 and would have caused a loss of 32.59% compared with the loss of 9.56% actually suffered under the rates now and in 1932 in force. It is further charged that the cost found to be reasonable by the Secretary would have been $1,461,394 less in 1932 than the actual and aggregate costs for 1932 of $3,122,908 as calculated by the appellants.

The figures set forth in this section of the bill are in the main admitted in the answer for what they show, but their relevancy is denied.

It is further charged that as to each species of livestock each appellant will not, under the rates prescribed, reimburse to him or it actual operating expenses, or expenses held to be reasonable by the Secretary. The answer admits that some of the appellants will not make their costs but denies that the appellants will not make costs found to be reasonable by the Secretary. Again we meet the issue of the managerial power and capacity of the Secretary of Agriculture.

It is further charged that the confiscatory effect of the rates prescribed will be enhanced by reason of the accelerat-

ing diminution in volume of business handled by the Chicago market agencies. The diminution is admitted but the effect denied. Increasing truck deliveries, it is charged, will enhance the confiscatory effect of the prescribed rates. Again, increasing truck-ins are admitted but the effect denied.

It is charged that the commissions under the prescribed rates for selling calves are largely below the reasonable cost as found by the Secretary for selling calves; and that there is no evidence to show that the appellants will do enough business in the bracket wherein the commissions are greater than the costs, as found by the Secretary, to make up the less-than-cost rate for the larger package brackets. This is denied.

Specifically it is alleged that the Secretary found the reasonable cost for the sale per head of cattle and calves was 42.97c, whereas the appellant whose business was conducted more economically than any of the other petitioning firms entailed an actual cost of over 57c per head in the sale of cattle and calves; and that the average of all the petitioners is a total actual cost of over 83c per head. Similar specific figures are given for the other species of livestock. The cost figures as found by the Secretary are admitted but the cost figures as found by the appellants are denied upon the theory that the appellants' costs are unreasonable because salesmen are paid salaries that are too high. Again the Secretary is imposing his judgment for that of the management of the businesses as to what compensation it is necessary to pay salesmen in order that they may render the best of service to the producers and shippers of livestock, and secure for such customers the top market prices.

Section 28a of the Bill is a charge by each appellant on his or its own behalf that the facts alleged in the preceding paragraphs of the Bill as to market experiences apply to

his or its own business without substantial variation; that his or its own business is conducted economically, efficiently and at reasonable costs and with the exercise of sound business judgment; that the rates, charges, and practices prescribed by the Orders of the Secretary, if permitted to become effective and if enforced, will deprive him or it of property and business without due process of law and will deny the equal protection of the law.

Section V.

It is here alleged that after the publication of the Order of January 8, 1934, the appellants filed a petition for rehearing wherein they sought to show among other things that the rates prescribed would make it impossible for them to pay operating expenses, and that substantially all of them under the rates in effect in 1933 had operated at a loss, which loss would be increased had the prescribed rates then been in effect. The filing and denial of the petition is admitted. An amended petition for rehearing was filed April 9th, 1934, wherein it is alleged, among other things, that the rates prescribed would create a net reduction of 25% in gross income, as compared with income from rates then and now in force. And that such reduction in income would be confiscatory because the prescribed rates would not produce income sufficient to pay the usual and necessary costs of doing business. The filing and denial of the amended petition containing the alleged allegations is admitted.

Section VI.

This section charges that failure on the part of appellants to comply with the order and supplemental order of the Secretary will render them subject to prosecution and to liability for heavy penalties and forfeitures as against

which liabilities there is no adequate protection at law; that they may be subjected to multifarious and vexatious suits for reparations on the part of various shippers of livestock.

It is further charged that if the prescribed rates go into effect losses will be incurred; and that if later it should be determined that the Orders are null and void the appellants will be without means of collecting the difference between the prescribed rates and the present rates without multifarious suits and actions at law, impractical in character and extending to most of the States of the Union.

It is admitted that the defendants will enforce the prescribed rates unless restrained.

The prayer of the Bill is for an interlocutory injunction and for a permanent injunction and order suspending and annulling the purported order and supplemental order of the Secretary.

SUMMARY OF ARGUMENT.

I.

THE RATES AND CHARGES SPECIFIED IN THE ORDERS OF THE SECRETARY OF AGRICULTURE ARE UNJUST AND UNREASONABLE, ARE BASED UPON FINDINGS MADE WITHOUT EVIDENCE OR UPON EVIDENCE INSUFFICIENT TO SUPPORT THE FINDINGS.

A. The performance required of salesmen by the Secretary has no relationship to actual experience; and consequently the costs allowed by the Secretary for salesmen's salaries are inadequate and unreasonable.

1. Cattle salesmen.
2. Hog salesmen.
3. Sheep salesmen.

B. The allowance for costs of business getting and maintenance is the substitution of the Secretary's judgment for that of the prudent management of the owners. There is no evidence in the record of waste or extravagance.

1. The function of business getting and maintenance is not only to secure and retain business but to serve the shipper of livestock.

2. The Secretary did not consider competition with other markets nor direct selling to packers.

3. The amount allowed by the Secretary for business getting and maintenance has no relationship to actual costs.

C. The Secretary's method for determining the proper allowance for owners' salaries was unreasonable, was based upon an erroneous rule, and is without foundation in the record.

1. The Secretary unreasonably considered reim-

bursement to cover management and to cover uninsurable risks to be profit.

II.

THE SECRETARY IN PRESCRIBING REASONABLE COSTS FOLLOWED NO WELL KNOWN OR WELL RECOGNIZED EXPERIENCE METHOD, PARTICULARLY IN RELATION TO THE PERFORMANCE AND SALARIES OF SALESMEN.

A. Yarding and office expense allowed by the Secretary, while below costs actually incurred, bear a relationship to actual cost. The departure from experience and evidence by the Secretary in respect to salesmen was arbitrary and unreasonable.

B. The method by which the Secretary found reasonable costs is not disclosed in his findings or orders.

C. The theories of the Secretary as to performance of salesmen cannot meet the test of economists of measurement by actualities.

III.

THE DENIALS OF THE PETITION FOR REHEARING WERE ARBITRARY.

A. One is not compelled to come to court on the issue of confiscation with the facts already found against him.

IV.

THE SECRETARY USED A SINGLE YEAR, 1932, AS A TEST PERIOD. THIS WAS INADEQUATE WHETHER HIS FINDINGS AS TO THAT YEAR WERE RIGHT OR WRONG.

A. Changed economic conditions and decrease of volume of livestock handled emphasize the necessity of an adequate test period.

V.

THE RATES PRESCRIBED BY THE SECRETARY ARE CONFISCATORY OF THE BUSINESS, PROPERTY AND SERVICES OF EACH APPELLANT AND VIOLATIVE OF THE FIFTH AMENDMENT OF THE CONSTITUTION.

A. The appellants have fulfilled every requirement to show that the rates prescribed by the Secretary do not return actual and necessary costs and are, therefore, confiscatory as to each appellant considered individually.

VI.

THE APPELLANTS WERE ENTITLED TO A TRIAL DE NOVO IN THE DISTRICT COURT BOTH ON THE ISSUE OF CONFISCATION AND ON THE ISSUE OF THE DENIAL OF PETITIONS FOR REHEARING.

PROPOSITIONS OF LAW.

The legal principles involved in this litigation are set forth in the following propositions of law, with citation of authority. These propositions of law support the argument summarized in the foregoing section of this brief. Many of the propositions it will be unnecessary to argue. On disputed questions of law, appropriate argument will be made in the body of the brief.

1. Courts will declare void an order of a rate-making body based on findings made without evidence, or contrary to the evidence, or upon findings made that are not clearly supported by the evidence.

Tagg Bros. and Moorhead v. *United States*, 280 U. S. 420, 443.

West Ohio Gas Co. v. *Public Utilities Comm.*, 294 U. S. 79, 82.

Denver Union Stock Yard Co. v. *United States*, 57 F. (2) 735, 738; D. C. Col.

Chicago Junction Case, 264 U. S. 258, 263.

Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U. S. 39, 44.

Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541, 547.

Akron C. & Y. R. R. Co. v. *United States*, 261 U. S. 184, 203.

Colorado v. *United States*, 271 U. S. 153, 166.

L. & N. R. R. v. *Finn*, 235 U. S. 601, 606.

2. Courts will declare void such an order if it rests upon erroneous rules of law.

Tagg Bros. and Moorhead v. *United States*, 280 U. S. 420, 443.

Denver Union Stock Yard Co. v. *United States*, 57 Fed. (2) 735, 738, D. C. Col.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42, 46.

Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U. S. 39, 43.

Miss. R. R. Co. v. *M. & O. R. R.*, 244 U. S. 388, 395.

3. The application to enforce or to restrain the execution of a lawful order of a rate-making body is a suit in equity to be heard upon *all* the evidence bearing upon the matters in controversy.

Interstate Commerce Commission v. *Alabama Midland R. Co.*, 168 U. S. 144, 174, 175.

Cincinnati N. O. and Texas Pac. Ry. v. *Interstate Commerce Comm.*, 162 U. S. 184, 196.

Texas and Pac. Ry. v. *Interstate Commerce Comm.*, 162 U. S. 197, 239.

Kentucky & Indiana Bridge Co. v. *L. & N. Railroad Co.*, 37 F. 567, 614, C. C. Kentucky.

Interstate Commerce Comm. v. *C. B. & Q. R. Co.*, 94 F. 272, 274, C. C. Ill.

United States v. *Missouri Pacific Ry. Co.*, 65 F. 903, 907, C. C. Kansas.

Interstate Commerce Comm. v. *Santa Fe R. Co.*, 50 F. 295, 304 C. C. Cal.

Interstate Commerce Comm. v. *Lehigh Valley R. Co.*, 49 F. 177, 180, C. C. Pa.

Interstate Commerce Comm. v. *L. & N. R. Co.*, 73 F. 409, 414, C. C. Tenn.

Missouri K. & T. R. Co. v. *Interstate Commerce Comm.*, 164 F. 645, 649, C. C. Mo.

Interstate Commerce Comm. v. *Union Pacific R. Co.*, 222 U. S. 541.

Manufacturers' Ry. Co. v. *Interstate Commerce Comm.*, 246 U. S. 457.

Crowell v. *Benson*, 285 U. S. 22, 60, 61, 64, 65.

4. When the owner of a property or business challenges an order of an administrative body as being confiscatory or otherwise an invasion of constitutional rights, such owner is entitled on that question to the independent judgment of the court both as to the law and as to the facts.

Crowell v. *Benson*, 285 U. S. 22, 60, 61, 64, 65.

Denver Union Stock Yard Co. v. *United States*, 57 Fed. (2) 735, 738, D. C. Col.

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 289.

Blue Field Water Works and Improvement Co. v. *Commission*, 262 U. S. 679, 689.

Lehigh Valley R. R. v. *Commission*, 278 U. S. 24, 36.

United Ry. & Elec. Co. v. *West*, 280 U. S. 234, 251.

5. No rate-making body is clothed with the general power of management incident to ownership; and hence no rate-making body has a right, in fixing reasonable rates, to ignore, exclude, or reduce items of operating expenses actually incurred and thus to invade the right of an owner to manage his property or his business. The Secretary of Agriculture has no power to substitute his judgment for that of the managers of market agencies in respect to salaries of salesmen or other operating expenses.

West Ohio Gas Co. v. *Public Utilities Comm.*, 294 U. S. 63, 72.

Utilities Commission v. *Springfield Gas Co.*, 291 Ill. 209, 234; 125 N. E. 891.

Citizens Gas Co. v. *Commission*, 8 F. (2) 632, 634 (D. C. Missouri).

New York and Richmond Gas Co. v. *Prendergast*, 10 F. (2) 167, 208, 209 (D. C. N. Y.).

Banton v. *Belt Line Rwy. Corp.*, 268 U. S. 413, 421.

Havre de Grace Bridge Co. v. *Towers*, 103 Atl. 319 (P. U. R. 1918-D, 484, 490, Md.).

Sparta v. *Monroe County Telephone Co.*, P. U. R. 1917-C, 507, 514, Wisconsin.

Brooklyn Borough Gas Co. v. *Prendergast,* 16 F. (2) 615, 623 (D. C. New York).

Aetna Insurance Co. v. *Hyde,* 34 F. (2) 185, 196 (D. C. Missouri).

Idaho Power Co. v. *Thompson,* 19 F. (2) 547, 575 (D. C. Idaho).

Denver Union Stock Yard Co. v. *United States,* 57 F. (2) 735, 747 (D. C. Col.).

Monroe Gaslight & Fuel Co. v. *Commission,* 11 F. (2) 319, 325 (D. C. Michigan).

Pacific Telephone & Telegraph Co. v. *Whitcomb,* 12 F. (2d) 279, 288 (D. C. Washington).

Interstate Commerce Commission v. *Chicago G. W. R. Co.,* 209 U. S. 108, 118.

Chicago Milwaukee & St. Paul R. Co. v. *Wisconsin,* 238 U. S. 491, 501.

Coplay Cement Mfg. Co. v. *Commission,* 271 Pa. 58, 114 Atl. 649.

6. Rates fixed by a rate-making body which are not sufficient to provide a reasonable return on the value of the property used at the time that it is being used for the public service are confiscatory.

Board of Public Utility Commissioners v. *New York Telephone Co.,* 271 U. S. 23, 31.

Blue Field Water & Improvement Co. v. *Commission,* 262 U. S. 679, 690.

Los Angeles Gas & Elec. Corporation v. *Commission,* 289 U. S. 287, 305.

Smythe v. *Ames,* 169 U. S. 466, 547.

McCardle v. *Indianapolis Water Co.,* 272 U. S. 400, 408, 409.

Ga. Ry. & Power Co. v. *Commission,* 262 U. S. 625.

Pacific Gas & Elec. Co. v. *San Francisco,* 265 U. S. 403, 415.

Denver Union Stock Yard Co. v. *U. S.,* 57 F. (2) 735, 740.

7. The value of the service to the user thereof is to be considered by the rate-making body in prescribing reasonable rates.

Smythe v. *Ames*, 169 U. S. 466, 547.
San Diego Land & Town Co. v. *City of National City*, 174 U. S. 739, 757.
Cotting v. *Goddard*, 183 U. S. 79, 91, 95.
Darnell v. *Edwards*, 244 U. S. 564, 570.
Vandalia R. R. Co. v. *Schnull*, 255 U. S. 113, 119.

8. A rate-making body cannot require the owner of a public utility to render service for less than the cost thereof or without substantial reward.

Northern Pac. R. R. Co. v. *North Dakota, ex rel. McCue*, 236 U. S. 585, 595.
Norfolk & Western Ry. Co. v. *Conley*, 236 U. S. 605, 608, 609.

9. The right to engage in an occupation or business is subject to protection under the Constitution of the United States just as well as is the right to own and enjoy property and the use thereof.

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 279.
Lawrence v. *Briery*, 239 Mass. 424, 132 N. E. 174.
Smith v. *Texas*, 233 U. S. 630, 636.
Truax v. *Raich*, 239 U. S. 33, 41.
Coppage v. *Kansas*, 236 U. S. 1, 14.

10. The adoption of a single year as a test or standard is arbitrary and inadequate.

West Ohio Gas Co. v. *Public Utilities Commission*, 294 U. S. 79.
Denver Union Stock Yard Co. v. *United States*, 57 F. (2) 735.
Knoxville Water case, 212 U. S. 1.

ARGUMENT.

I.

THE RATES AND CHARGES SPECIFIED IN THE ORDERS OF THE SECRETARY OF AGRICULTURE ARE UNJUST AND UNREASONABLE, ARE BASED UPON FINDINGS MADE WITHOUT EVIDENCE OR UPON EVIDENCE INSUFFICIENT TO SUPPORT THE FINDINGS.

The Secretary made findings in respect to "potential performance" of salesmen for each species of livestock. The market average for cattle in 1932, the year under investigation, was 392 carloads per salesman; the Secretary says that 1,000 cars is reasonable; only two firms reached that average. Of a hog salesman the Secretary requires a performance of 1,060 carloads per year; the market average was 385 carloads in 1932; no single appellant reached that prophetic achievement. For sheep salesmen the Secretary would demand a performance of the sale of 1,035 carloads per year. Actual performance averaged 465 cars in 1932. Two appellants reached the Secretary's goal in 1932. (References, Secretary's findings; Respondents' Exhibit 12, Schedules 24.)*

The Secretary made findings as to reasonable costs, to be discussed later. Since costs alleged to be reasonable are based by the Secretary upon a hypothetical performance, it is necessary to discuss at length the evidence upon which the Secretary based his "potential performance". The

*The Secretary quotes instances of higher performance of salesmen than some of the figures shown by Respondent's Exhibit 12 and used herein. This difference is accounted for thus: If a salesman who spent full time selling during market hours, solicited in the country over weekends, or wrote letters or made out account sales at night, the time thus spent was subtracted from his function as a salesman, and he was credited with being only a fractional salesman. Thus dividing the carlots sold by a firm by fractional rather than by whole salesmen, the Secretary boosts the average performance per salesman.

findings are not based upon what is done, as we later show in more detail, but upon opinion evidence of what might be done.

In paragraph 125 of his Findings (R. Vol. I, pp. 143-144), the Secretary refers to the testimony of witnesses to justify his findings in respect to the performance of salesmen. A reference to the testimony itself shows an inaccurate paraphrasing in the Secretary's findings.

Harold Summers, the first witness referred to in that section, did not state that he could handle the amount of cattle that came to his firm. He said (R. Vol. I, pp. 359-364) what a salesman could do under any and all conditions was guesswork; that sometimes cattle sold themselves, and sometimes it took a salesman four hours just to sort them.

The next statement in paragraph 125 reads:

> "Another witness stated that he had sold four carloads of cattle in one day and had sold out by noontime, and if he had had two more loads that day he could have sold them. It was his well formed opinion that he could sell six loads of cattle in a day. He stated that if he should get ten loads of cattle, he would go out and sell them and would not hire any extra help in selling them but that he might require some extra help in yarding. This estimate applied to all kinds of cattle."

The witness in question was W. C. Patterson, called by the Government. His testimony as shown in R. Vol. II, p. 375 is:

> "The four carloads of cattle which I sold about in February I believe went over the scales about 12:00 o'clock. If I had eight loads of the same kind and quality to sell I could not say whether or not I could sell them because ofttimes you can sell four loads and have an additional four loads of the same kind, and you might not get them sold the same day because one buyer had suited his order and the other fellows would not bid you on the other four for as much as you got for the ones you considered the same cattle, but that is the way the market runs. There is a market for

everything that comes to the Chicago yards for some kind of a price during the day. If I had eight loads I could have gotten some price for them if I had been willing to take it maybe."

With reference to the ten cars, the witness testified (R. Vol. II, p. 382):

"Q. *If there were half the commission firms here, you believe you could sell ten a day, don't you?* (Italics supplied.)*

A. Yes, I might not be able to sell ten if the market condition was, it would be owing to market conditions whether you could or could not, day in and day out, there might be days you could do it easily. *I could sell ten a day on some days and on other days you could not.*"

He stated at R. Vol. II, p. 380 that one man could not sell ten cars of cattle of mixed stuff in one day.

We have searched the record for the statements of the next witness that is said to have given his opinion that a good salesman should be able to sell 25 loads of steers in a day, but cannot locate it.

The next statement in paragraph 125 reads:

"A witness who is a representative of a live stock producers organization testified that in his opinion a cattle salesman should handle 2,000 cars of cattle in a year and a hog salesman should handle an equal number of hogs in a year. This witness has had experience in shipping a great many cattle and hogs to the markets at Omaha and Chicago and has spent considerable time on the markets observing the sale of livestock." (R. Vol. I, p. 144.)

The witness actually stated (R. Vol. I, p. 313):

"I have spent a great deal of time at various live stock markets, and have been on the Chicago market and seen sales made *occasionally.*

"Mr. Miles: I will ask you this: In your opinion, how many carloads of cattle should a salesman of ordinary efficiency sell in the course of a year? I want

* Unless otherwise indicated emphasis is supplied throughout this brief.

you to consider that there are good days and bad days, rainy days, sunshiny days, take it throughout the year. Just how many carloads of cattle do you think a salesman should sell or could sell if he had all that he could do?

"Mr. Boyd: I object to the question. The witness has not shown that he has ever sold any cattle on the Chicago market at any time, as a salesman, and that it would be a mere opinion and have no binding effect upon these respondents.

* * * * *

"Mr. Miles: Mr. Examiner, I think that if counsel will read the Omaha case again he will see that the criterion is not what a man does do, but what he could do. I think the question is perfectly proper. The witness has testified that he has observed salesmen.

"The Examiner: Objection overruled.

"The Witness (Continuing): Well, I never yet saw a cattle salesman that placed any particular limit on the number of cars that he could sell if he had them to sell. I would, in answering that question, base my answer on a 200 selling day year, which would be practically four days a week, and I think that any salesman would say that he could sell at least ten cars of cattle on any day, if he could get them to sell, and that would be a minimum of 2,000 cars a year applying to cattle.

* * * * *

"Mr. Miles (Continuing): I will ask you, Mr. Mollin, if that is your opinion, that a man could, under the circumstances named, sell 2,000 carloads a year.

A. Absolutely" (R. Vol. I, pp. 313-314).

The witness was testifying in the month of May. He said that the last time he had been at the Chicago Stock Yards, the last time he had been in cattle pens at the Chicago Stock Yards was the previous December, he guessed; that he did not observe livestock being sold by a salesman at that time. When asked the last time he had observed a salesman in the cattle alley on the Chicago market, he said that he had not been active in the live stock business since 1928, that he had been in the stockyards since 1928 several times, but had not learned anything that he did not previously know about

it; that he did not follow his salesman around and observe his work; that he had been in the pens and seen him, seen some actual selling. He said he was in numerous pens that he could not tell exactly what salesmen he had observed. When asked if he could recall any particular salesman at that time he stated that it had been his practice when he came to Chicago to look up his old friends that he used to ship cattle largely to—Rosenbaum Brothers, Luther Conover of the National (Luther Conover has never been connected with the National), that he had dropped into their pens two or three times since he had been with the National Live Stock Association.

When asked upon what he based his opinion that a live stock salesman could sell at the present time on the market ten loads of cattle a day just what factors he took into consideration, he stated that he had never seen a live stock salesmen that could not sell ten cars of cattle in a day if he had them to sell; that he had seen them sell so many more than that number of animals on occasions without apparently straining their ability, that he thought he had been reasonable in setting it at ten cars a day. As to what salesman he had in mind as selling ten cars a day currently, he stated that he was testifying from his experience as to what he thought they could do, that he thought any of them could sell ten cars a day if they could get them.

In answer to the question as to his familiarity with the marketing situation at Chicago at the present time and the manner in which the live stock is received, he stated that he was familiar with the situation the way it was when he was shipping cattle to Chicago and that he did not assume that it was much different than it was then, but his testimony was based on his own experience and not on conditions to-day, but that if it could be shown that conditions are vastly different that would be in the record (R. Vol. I, pp. 316-317).

The next witness discussed by the Secretary (R. Vol. I, p. 144) is said to have testified that:

> "A cattle salesman testified that over the course of a year a salesman could sell five carloads of steers per day if the market is right. He stated that during the present summer he had seen salesmen sell as many as ten carloads in a day."

E. A. Brotzman is the witness referred to (R. Vol. II, p. 849). The witness testified as follows (R. Vol. II, p. 857):

> "Q. In your opinion, what may a cattle salesman be reasonably expected to sell, based on per day, or on the month, assuming now that he had all that he could handle?
>
> The Witness: It is pretty hard to form an opinion, Mr. Examiner. Market conditions some days, one could sell cattle much faster and easier than he could sell on others. I would not want to say how many cattle a man could sell in a day because so many things enter into the trading. Our firm sells all the live stock that comes to us from day to day over the course of a year. We aim to sell all we can, sometimes we have to hold some over.
>
> Q. Assume a steer salesman had five straight carloads of steers, each and every market day throughout the year, in your judgment could he sell that number without any other salesman assisting him?
>
> A. Five carloads?
>
> Q. Yes, sir.
>
> A. On a good market he could sell five loads, on a bad market, I have seen times when a man did not get any sold.
>
> Mr. Miles (Continuing): But at the end of the year, do you believe that he could have sold an average of five carloads per day each and every market day, recognizing that some days you have a fast market and some days you have a slow market?
>
> A. Well, gentlemen, I believe I told you when I first came in here that I sell cow stuff, and I don't like to say what a steer man could do. * * *
>
> A. I have seen a man sell a great many more than five carloads in a day.

Q. How recently?
A. This summer.
Q. Do you know how many carloads that man did sell on that particular day?
A. No, not the exact number.
Q. Could you *approximate it*, about how many?
A. Ten."

Further from the findings, paragraph 125:

"The owner of one of the large commission firms testified that taking the average of the market as cattle come, he and two salesmen could sell fifteen cars per day."

The witness was Edward J. Lawler (R. Vol. II, p. 869) of the firm of Lawler Brothers. Mr. Lawler testified (R. Vol. II, pp. 878-880):

"Q. I wanted you to assume now that you and two others, you and two other salesmen had fifteen carloads of steers, single ownership, to work on, whether you believe that you three would sell those fifteen carlots per day on an average throughout the year for all market days?
A. Yes, sir.

* * * * *

Q. Do you have business arriving to your firm that will admit of the employment of a salesman so that they can sell five cars on the average per person per day of steers or other cattle?
A. I would not think so. * * *
Mr. Boyd (Continuing): Well, if the business of your firm will admit or you think you would be able to sell, on the average, of fifteen cars a day, why did you not sell them all yourself, because that average approximates two-thirds of all the business that your firm handled during the entire year with all of the force you had.
A. Well, it would not be possible to sell fifteen cars every day myself and do it justice.
Q. With the total number of cars handled by your firm in cattle, all kinds, truck, rail and otherwise was 4,496 cars, 15 cars a day for three salesmen amounts to 3,000 cars per year, assuming there are 200 market days, each and every day. Do you follow me?

A. Yes.

Q. Now on that basis do you believe that you had too many men working for you during the year?

A. Well, I know that we haven't.

Q. Well, if your men, if you expect, would expect your men to be able to handle and sell fifteen carloads per day, that is, every market day, why do you keep as many salesmen as you have in view of the fact that the average of your salesmen was 642 cars per year or the average per market day of a little over three cars? * * *

A. Well, we find it keeps us busy handling what we are getting with the help we have got. I thought our range was higher than it is.

Q. Do you still think you could handle fifteen cars per day with the three men on each market day of the year?

A. Not in the way they come (R. Vol. II, p. 878.)

* * * * *

Q. Then, you do not intend that your testimony should be used for the purpose of indicating what your salesmen could reasonably be expected to do in handling the type of receipts that come to your firm?

A. No I figured our percentage was higher than it is, I didn't know it would run so light.

Q. What were you basing your answer on, what you thought your salesmen were doing?

A. From the fact that we seem to be busy all the time, early and late (R. Vol. II, p. 880).

Mr. Lawler further testified (R. Vol. II, p. 883):

Q. And your answer was based upon a misunderstanding or a lack of knowledge as to what your actual performance was during 1932?

A. I would say so.

Q. And, in making the answer you were considering in part at least your actual performance, or what you thought your actual performance was?

A. Yes.

Q. And about that you say you find you were mistaken?

A. I do.

The next witness is credited with saying:

"The calf salesman for this firm testified that he

had handled about 1,500 calves on one day in 1933, and that his assistant had sold only a few out of that number." (R. Vol. I, p. 144.)

The witness was Mr. Wm. F. O'Meara (R. Vol. II, p. 591):

"I have had occasion to examine the records with regard to the 1,500 calves that I testified about being sold yesterday. I ascertain there were 1,370, on April 4th, of this year. I do not remember the state of the market. I do not know the number I sold and the number Mr. Lawler sold. Mr. Lawler generally supervises my work in connection with the handling of calves. He is the proprietor of the firm. I do not remember how I brought about a clearance or how I sold them on April 4th, that was our largest run this year. It is not usual that we would have one-third of the total car receipts as was the case on April 4th. The day was unusual in that the bunches were all large. The number of owners were fewer than we would ordinarily experience in a run of that size. And it took a fewer number of trades than we would ordinarily have experienced if the bunches were smaller."

The Secretary credits the next witness with saying:

"The owner of one of the respondent commission firms whose business is being cleared by another firm testified that he would want 150 carlots of cattle per month in order to set up his own organization. He stated that it would depend upon the amount of cattle whether he would need an extra salesman." (R. Vol. I, p. 144.)

The witness said (R. Vol. II, pp. 813-820):

"I suppose if I had 150 loads a month, it would be ample to get back on my own and re-establish my own firm. As to how many I believe I would be able to handle without employing another salesman; there are two or three different classes of cattle that come into the market. If you are selling all your cattle and you should happen to get a big run of butcher stuff, that would require all your attention, if you had a run of steers on the same day you would not be able to give one or the other enough attention, you would

have to have some help. Yes, I said if I had 150 loads a month I would feel justified in starting back into my business on my own. I did not have any class or kind of cattle in mind, just taking them as they come. Now, taking them as they come, it would all depend on the kinds of cattle I have, about how many I would feel I could handle before I would want or need to employ another salesman. If my week's supplies come in one day, I would have to have plenty of help.

Q. If they came to you as they did come when you were in business for yourself, would you need any help? * * *

A. Right away.

Q. What do you mean?

A. I would have to have an assistant right away.

Q. At what figures, at, 150 carloads per month, is that what you mean?

A. Or even less than that (R. Vol. II, p. 814).

* * * * *

Mr. Boyd (Continuing): Well, now, Mr. Mullen, in the month of January, you had 1,492 head of cattle arriving single ownership in straight cars; there were 50 owners, 50 accounts sales and 165 drafts; in other words, in that month, there were a little over three drafts per account sales; now do you know what business you handled in the month of May in that year?

A. No.

Q. Are you able to say the number of owners?

A. No.

Q. The number of account sales?

A. No.

Q. The number of drafts?

A. No.

Mr. Miles: Objected to as immaterial.

Examiner: Objection overruled.

Mr. Boyd (Continuing): There were 809 head, 21 owners, 21 account sales, and 83 drafts, during that same month; you had plural ownership in the month of February, 7 carloads of cattle in straight cars, 190 head, 27 owners and 59 drafts. * * * (R. Vol. II, p. 818.)

Q. The number of drafts into which you have to break up a shipment increases the number of sales necessary to be made to dispose of them? (R. Vol. II, p. 819.)

A. Yes.

Q. Now, if the 1,492 head that you received could have been sold in one draft, and I mean, by that, one sale, that would have required one amount of work?

A. Yes.

Q. And if you had been able to sell them in 100 drafts that would have been something different, would it not?

A. Yes, sir.

Q. And you actually sold them in 165 drafts. Now can you tell me how long it would have taken you to sell those 1,492 cattle if you had sold them in 100 drafts?

A. No, I cannot, no.

Q. And can you tell how long it would have taken if you had sold them in 200 drafts?

A. No, no one could do that—it would be impossible. We don't know how long.

Q. Then, can you tell how many carloads you can sell without knowing all the circumstances surrounding the situation at the time, can you visualize conditions over a year and decide what you can do either during that year or during the subsequent year when it takes accountants weeks to draw off the information to tell what you actually did and record it on paper?

A. No, I can not tell. * * *

Q. *Well, do you think that any thinking man can answer the question as to what a man can sell in a day and accurately reflect the facts?*

A. *It is impossible.* (R. Vol. II, p. 820.)

We submit that a proper consideration of the correct statements made by witnesses referred to in Section 125 does not furnish the slightest evidence which would warrant casting aside of the regular performances of the men who are responsible for the making of the base price for live stock in this country.

The extracts taken from Mr. Mollin's testimony incorporated above shows that he was entirely unqualified to furnish estimates of probable performance and taken on the whole his opinions are admitted by him to be second-hand hearsay.

The record contains no evidence which controverts or denies that the performance of the salesman must be measured primarily by the service necessary in completing a sale and the number and kind of livestock comprising the sale. The Secretary has arbitrarily and capriciously adopted the carload or head sold as the yard stick. The position of the Government below was that John Clay & Co. and the National Live Stock Commission Company salesmen averaging 1149 and 1043 carloads, respectively, per man, that other smaller firms, inefficient because of sales average per man of less than 1,000 cars, had so small a volume that as individual firms their experience is irrelevant in determining what can be done with a reasonable volume. The record is clear that it is erroneous to attempt to judge time required to perform a sale without knowing many facts—first of all, the number of sales required to dispose of a given number of head. John Clay & Co. and the National Live Stock Commission Co., the criteria cited so frequently by the Government, do not in fact furnish a guide for judging fair performance to be expected of others, or of the cost of selling to be properly applied to the market. The record shows and the Secretary and his advisers know from the evidence of Gene McAdams (R. Vol. II, p. 382) and E. G. Fulkerson (R. Vol. II, p. 790), that John Clay & Co. and the National Live Stock Commission Company have a cattle and calf clientele that is made up principally of the larger operators, making the carload-equivalent performance of those firms far above that to be expected of the average salesman who is as able and who works as hard, as long and as diligently in performing his duties as do Clay's and National's salesmen.

The record shows that John Clay & Company sold 125,194* cattle and calves which arrived by rail, and 8849

* The following figures are taken from and are computations made from Respondents' Exhibit 12.

cattle and calves which arrived by truck. To sell the rail business necessitated 14,834 drafts or sales; to dispose of the truck business required 2521 drafts or sales. The total is 134,643 head with 17,364 drafts or sales. Clay's salesmen averaged 8.4 head of cattle and calves per sale which arrived by rail. Clay's salesmen average 3.1 head per sale which arrived by truck. Clay's truck business was 6.6% of their total business. The market average per salesman was 4.8 head of cattle and calves per sale on rail arrivals; 2.2 head of cattle and calves per sale on truck arrivals; and in the market receipts of all firms 15% of the total business in cattle and calves arrived by truck.

The National Commission Company sold 125,251 cattle and calves which arrived by rail, necessitating 19,074 sales or 6.5 head per sale, 2 more head per sale than the market average. The same company sold 9945 cattle and calves arriving by truck, necessitating 3686 drafts or sales. This was 2.6 head per sale, substantially more than the average. Each of these firms had 5 cattle and calf salesmen.

The testimony of other cattle and calf salesmen was to the effect that they were fully occupied in performing their duties on most of the market days during the year.

From examination of the testimony of forty or more of the salesmen and owners connected with the firms which the Secretary regards as inefficient, it will be found that almost without exception, these firms are taxed to their capacity at the peak seasons of the year; and that the low average annual performance per car per salesman is due in part to the class of the business and the territories from which it is drawn, that their clients are small raisers of livestock marketing in small quantities, or marketing in such a way as to necessitate a low per head selling. This is confirmed by the following table showing the cars sold by such firms, with the number of drafts or sales necessary

to complete such transactions. This indicates conclusively that the Secretary was not attempting to determine fairly the amount of effort necessary to be expended, or the time required in the making of sales on the market.

CATTLE AND CALVES.

Name of firm	Total head sold	Total drafts or sales	Average number head in draft	Average number cars sold per salesman
Alexander, Conover & Co.	141176	21565	6.6	884
McCausland, Hoag & Vaughn	57413	8460	6.8	709
Lawler Brothers	157137	31214	5.0	642
Walters and Dunbar	83205	17104	4.8	532
Bowles L. S. Com. Co.	58259	14481	4.0	440
H. D. Copeland & Co.	46456	13539	3.4	282
Baker, Heyne & Co.	29241	9400	3.1	246
Swiney Brothers	19355	6088	3.2	226

Note: The foregoing data are taken from Resp. Ex. 12, Sch. 13, 16 & 24.

Dr. H. H. O'Neill, head of the Economics Department, St. Louis University, testified:

> "If the standard of performance or theoretical performance is way in excess of the actual performance, it is rather an evident fact that the standard or theoretical volume of sales is erroneous, because in any piece of scientific work we always subject our hypothesis, or theory, to the test of what has actually happened, or what has actually been accomplished; and so necessarily any standard that deviates by a wide margin from what has actually occurred must be wrong." (R. Vol. II, pp. 1131-32.)

The performance required of salesmen by the Secretary has no relationship to actual experience; and consequently the costs allowed by the Secretary for salesmen's salaries are inadequate and unreasonable.

Cattle Salesmen.

The Secretary in dealing with what he calls "potential salesmanship", sought opinions of a number of salesmen

as to their capacity in terms of volume of livestock to be sold within a fixed period of time. The witnesses generally expressed the view that the element of chance had so great an influence, that factors beyond their control so limited their operations, and the diversity of conditions under which they operate prevented any fair prognosis as to performance; that peaks and valleys occurred without notice to those performing the service and that any statement would be a mere guess because of constantly changing influences, which condition in itself creates one of the most complex problems of management.

The Secretary proceeded on the theory that the unit of work should be a carload of livestock, and that the efficiency and wage of a salesman should be in accordance with the units of such work performed within a given space of time, which is against all of the evidence adduced at the hearing. Such a standard is unknown in the practical management and operation of this business. This is the undisputed testimony of the numerous managers who testified.

The Secretary summarizes his quest for evidence in support of this theory and thus reaches the conclusion and finds "that it is reasonable to associate a salesmanship performance of 27,000 head, 1,000 car or carload equivalents, or above of animals of the bovine species with a salary of $4,500.00 and up" (R. Vol. I, pp. 149-150); the yearly performance expressed in terms of carloads, together with the salaries of all salesmen, are set out in Respondents' Exhibit No. 12, Schedule 24, the arithmetical average being 392 carloads or carload equivalents.

The table below compares the actual cattle and calf salesmen of the Chicago market for the year 1932 with the myth-

ical salesman set up by the Secretary of Agriculture. The data in this table is found in Respondent's Exhibit 12, Schedule 24-A, Sheet 4; petitioners Exhibit No. 9; and the Findings of the Secretary; and calculations made therefrom

Actual Cattle and Calf Salesmen	1932	Secretary's Cattle and Calf Salesmen
217	Number employed	85
$5,608.08	Average salary	$4,500.00
10,584	Number of head sold (average per man)	27,000
392.	Number of cars sold (average per man)	1,000
85,230	Number of cars sold	85,230
$.4024	Salesman's salary, per head	$.1667
1,000	Active market hours per year	1,000
2 hr. 32 min.	Time to sell a car	60 min.
5.65 min.	Time to sell a head	2.22 min.

From the above table, it appears that the actual number of cattle and salf salesmen employed in 1932 was 217; the Secretary would reduce this number to 85. The average salary would be reduced from $5,608.08 to $4,500.00.

Only 22.18% of the salesmen sold 500 or more cars during 1932. In other words, *over three-quarters of the salesmen sold less than one-half of the 1,000 cars demanded by the Secretary.*

We turn to the evidence.

In computing what he termed a reasonable allowance for salesmen's salaries, the Secretary made performance demands. Neither the performance required nor the salary allowed have any relationship to what salesmen can do nor to what they can be purchased for.

The Secretary has failed to give proper weight to the undisputed testimony of salesmen that their work is governed by conditions entirely beyond their control. What they receive in shipments, the nature of such receipts, the time of the day or night, or day of the week, are so governed; the action of the buyers and unwillingness to buy

at satisfactory prices, all or a part of what he has for sale, places his performance beyond his control. Whether there is much or little in volume to sell on a market day, he must be at his sales pens (R. Vol. II, pp. 777-78), keeping constantly informed on the action of the market, which can only be learned by observation as the market progresses throughout the day—to classify cattle in one's mind, they must be seen—and as livestock arrives throughout the market hours, he must be available to receive it and to proceed to sell with as little delay as possible. In a word, eternal vigilance is demanded.

At paragraph 117 of the Secretary's findings (R. Vol. I, p. 137) the Secretary discusses "reasonable unit cost plus reasonable unit profits to be covered into reasonable commission rates."

At Section 122 (R. Vol. I, p. 141) the Secretary made the following finding:

> "The rate payer should not be expected to pay in the form of rates an amount for the services of a salesman in selling his livestock greater than is necessary to employ a salesman of first-class ability, handling a volume of business which will utilize his time with a reasonable degree of efficiency. In this proceeding some salesmen testified that they might spend an entire day showing a few head or a few carloads of livestock, and that the entire trading period would be required to sell them. However, that fact does not establish the efficiency of such salesmen for the reason that they could possibly have shown and sold other livestock at the same time. The volume of business which a salesman can efficiently handle is an important factor in the determination of a reasonable allowance to be made for salesmanship. Respondents themselves do not contend that the rate payer should pay rates which would sustain at a living wage a salesman who could handle only one car a year. Others testified that if a salesman did not have more than 50 cars a year he should get off the market. Confronted with these conditions, the question arises as

to what is the criterion to be adopted for a reasonable salesmanship performance.'"*

A picture of market conditions and operations, demonstrating that a finding as to what should be done can be made only on a basis of what is done, and not on a basis of prophecy, is shown by the testimony of witnesses.

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* Section 117 continues:

"The owner salesmen and employed salesmen of respondent commission firms are, as a result of years of experience, qualified to express opinions with respect to a reasonable salesmanship performance. They are familiar with the conditions under which livestock is sold from day to day, from week to week, from month to month, from year to year, on the Chicago market. In commission rate proceedings heretofore held under the Packers and Stockyards Act opinions have been obtained from salesmen with respect to this question. The facts as to potential salesmanship capacity lie peculiarly within the knowledge of those who are actually engaged in selling livestock or who through long observation and familiarity with selling operations on the market are qualified to express opinions. With few exceptions witnesses, members of respondent firms in this proceeding, engaged in selling livestock were not frank to express their opinions, but on the contrary many of them declined to express an opinion or stated that they could not give an opinion. A careful reading of the record leads to the conclusion that this attitude on the part of the witnesses was brought about in part at least by the type and character of objections which respondents' counsel made on substantially all occasions when the question with respect to potential selling capacity was asked. It is apparent from the record that this failure on the part of the witnesses to testify with respect to the matter in question was the direct result of the improper and illegal character of the objections made, which had the effect of instructing the witness not to answer the question. In fact, it appears from the record that it was the deliberate intent of counsel to prevent the development of testimony with respect to potential selling capacity for the reason that in some instances respondents' counsel pointed out to the witness that such testimony had been used in other commission rate cases where commission rates had been reduced, and instructed the witness to remember that if he answered the question it might result in a reduction of his rates in this proceeding. In this connection the language of the Supreme Court is singularly appropriate as used in the case of *Knoxville* v. *Knoxville Water Co.* (212 U. S. 1, 18) where it is said * * * that the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

This constitutes a flagrant misstatement as regards the conduct of counsel or the attitude of the witnesses. The exact statements of both witnesses and counsel will be found at pages 358-362; 363-364; 368-373; 377-382; 389-392; 396-397; 401-405; 417-420; 440-443; 447; 455; 459; 466; 481; 491; 492; 514-520; 544-547; 552; 553; 556; 559; 586-587; 609; 661-668; 670-700; 727-728; 740-741; 749-751; 755-759; 814; 828-829; 831; 846-849; 855-868; 870-871; 873-885; 889; 897; 899; 900; 901-902; 906-907; 919; 921 of Vol. II of the record. These questions and answers we believe demonstrate incontestably the futility of expecting categorical answers, or in fact any answers other than those made to questions of the type propounded by the Government. In paragraph 108 (R. 132) the Secretary refers to the assistance given him by the appellants and the Government accountant refers to their "cooperation" as "excellent." (Govt. Ex. 49.)

Mr. E. G. Fulkerson, a witness called by the respondents, testified at (R. Vol. II, p. 771) in regard to the matter of estimating the amount or quantity of cattle that can be sold on the Chicago market. The questions and answers are as follows:

Q. Tell me, if you will, please, the conditions which you as a salesman of long experience and as an employer of cattle salesmen, believe must be known before an estimate as to the amount or quantity of cattle that can be sold on the Chicago market may be made?

A. Well, there is no way of estimating that that I know of, Mr. Boyd. One day we have orders or our shippers will have pretty good orders for shipping cattle, and the next day they will be light on shippers, and may be the day that they have good orders for shippers, the fellows on the house cattle will have light orders, and it is mighty hard to tell how, I would not know how to answer that question. I don't get the thread of it, some way, I don't believe—you had better modify that and ask me that over so that I can understand it thoroughly.

Q. Would you read the question?

(Whereupon the question was read.)

A. I don't think there is any way of knowing or telling how many cattle a fellow can sell or estimate it. I would not know how to. You have got so many things that come in there that you have got to analyze. It is according to your receipts, according to your demands, and take it now, we have got so many different varieties of cattle, that you have got to get buyers to buy them, that it is hard for me to answer that question correctly."

(R. Vol. II, p. 770):

Q. The record shows that you handled in head per draft 5.82. That the market average was 4.14. Does that indicate to you that your salesmen would have necessarily a greater performance by reason of that fact than the market averages?

A. It would indicate to me that we get them in a little larger bunches.

Q. And are able to sell them in larger bunches?

A. Larger bunches without sorting them quite so much.

Q. That in your case, the drafts per carload of cattle and calves was 4.58; that the market average was 6.85; which would indicate what with reference to selling?

A. That we sold them in larger bunches, wouldn't it?

Q. Is that what you think is a fact?

A. Yes, sir.

Q. All of these conditions, would, in your judgment, enable your salesmen to perform a larger amount of work throughout the year?

A. Yes, sir.

Q. And the fact that your customers ship in larger numbers per consignment, permitting a larger number of head to be sold per sale, enables your salesmen to have a higher performance?

A. Yes, sir.

(R. Vol. II, p. 777).

The witness continued (R. Vol. II, p. 777):

In the case of two firms having salesmen of high standard and good reputation, in the sale of a similar number of cattle, one will be able to sell at the market and sell out early, and the other will be required to hold and sell out late, that happens every day here in the yards, and the time I sell out depends upon the rapidity with which I can perform my end of the work, and the willingness of the buyers to buy. On bad markets, buyers deliberately hold back and delay their operations and in the case of heavy runs. They will purposely look at cattle slowly under certain conditions and do a lot of unnecessary talking or anything else to delay their operations. The purpose of that generally is to sound the market and buy them as cheaply as they can, and get the fill out of them later in the day. If buyers seem to be operating slowly, we expect them to do a lot of unnecessary and unusul talking, that is one of the evidences of attempting to slow down the trade that we encounter. And they will go back and look at cattle the second time for the same purpose before they leave your alley, sometimes oftener than that. The methods employed by buyers when they

have set about to attempt to buy at lower prices, they lay back and wait and stall and won't bid you until late in the day. That does not mean they are not taking our time or they are not looking at the cattle.

* * * * *

Q. What is the least performance you would expect of one of your cattle salesmen and still keep him on the payroll as far as volume handled is concerned.

A. That is so uncertain, Mr. Dagger. Some days you would only have just a lot or two and other days you would have a pretty liberal run. There is no way of telling that. You can't fire a fellow because we happen to be light for a day or two or a week. The next week we might be heavy again.

Q. Taking it for a year?

A. I would not know about that. There are five of us who sell our cattle.

Q. The employment of a cattle salesman or any salesman is a business proposition, is it not?

A. Sir?

Q. The employment of a salesman by a firm which is actively engaged in business is a business proposition, is it not?

A. Yes, sir, it is." (R. Vol. II, p. 788.)

Edward J. Lawler is a proprietor of one of the large firms at the yards, which started in busines shortly after the Civil War. He is a steer salesman and employs four steer salesmen besides himself. Employs another salesman to sell cows and heifers. Another salesman sells the bulls and still another sells the calves.

The names and salaries of these salesmen are shown on Respondents' Exhibit 12, schedule 24-a, which shows that the seven salesmen sold 4,496 cars, or an average of 642 cars each. This compares with the market average of 392 cars per salesman, and with a requirement fixed by the Secretary of 1,000 cars.

Mr. Lawler testified (R. Vol. II, p. 872) that he did not measure the value of the salesmen in his employ by the number of carloads of livestock they can sell; that that is

not a fair basis in his judgment to estimate the worth of a man; that he does not think it is the prevailing practice at these stockyards to determine the worth of a man by the number of carlots he can sell; that the sale of carlots as such are the exception rather than the rule; that the sales he actually makes range from sales of one animal up to sales of a carload, and in rare instances, the sale of more than one carload at the same price.

The witness further testified that cattle prices range from the top price downward until the lowest sale price that is reached; that between the top and the bottom prices will be livestock which will sell at a difference of five cents per hundredweight on the various grades and classes; that the smallest division in price for one hundred pounds is five cents on any particular day, so that cattle ranging from $9.00 to $10.00 would have twenty price ranges, and so on down with each front figure there would be twenty variations for each dollar in price, so that if the price ranged from $4.00 to $10.00 there would be 120 variations in price on the same day's market.

Salesmen must know in what price variation his cattle fall and demand and be able to get that price.

The complexities of operation are illustrated by the fact that during the month of January, 1932, Mr. Lawler's firm received and sold cattle, single-ownership, arriving by rail, two cars containing 35 head of cattle sold in one draft; one car contained 30 head of cattle sold in 11 drafts; two cars containing 51 head of cattle sold in 16 drafts; two cars containing 52 head sold in one draft; one car containing 24 head, 10 drafts; one car containing 20 head, one draft; one

* A consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the (R. Vol. I, p. 191) name of one person to one market agency to be offered for sale during the trading hours of one day.

A draft is all of those animals in one consignment weighed as a single sales or purchase classification. (R. [redacted] I, p. 192.)

car containing 36 head, two drafts; one car containing 36 head, 14 drafts. (R. Vol. II, p. 870.)

During the same month, to further illustrate the diversity of service required, Lawler's firm received by truck, a consignment of forty head of cattle sold in two drafts; 11 head of cattle sold in 5 drafts; 9 head of cattle that sold in 4 drafts; 34 head of cattle that sold in 3 drafts; 6 head of cattle sold in 4 drafts. He had a great many one-head consignments that sold separately, and a great many of two-head that were sold in two drafts and many of four that he sold in three drafts, and so on. The same situation prevailed in each of the months of the year, not in precisely those types or amounts, but the mixtures and the drafts varied from shipment to shipment, from day to day; and from month to month. He stated that it was necessary to sell them that way to the best advantage. (R. Vol. II, p. 871.)

Mr. Lawler stated that he could not recall from memory the market conditions for the various grades of animals, or the condition of the market on any day in 1932 covering the grades and classes that he sold; that he could not recall the length of time from memory that it took to handle any consignment of livestock that he handled in 1932. (R. Vol. II, p. 871.)

He said he would not be able to answer as to the number of cars that a salesman ought to handle in a year to be an efficient salesman, notwithstanding the fact that he had a great number of years of experience on the market and had sold a great many cattle, and had employed a number of salesmen, had observed their work and still could not answer. (R. Vol. II, p. 873.)

Mr. Lawler further testified that he had operated his firm during the years 1931 and 1932 on as little expense as was possible to render proper service to shippers (R.

Vol. II, p. 874); that it would be impossible in the management of his concern to bring about a condition whereby his concern, which has a diversified business, could create income which would equal or exceed his expenses each week, or each month, depending upon the fluctuation of receipts. It would be impossible to change either. He stated that the business he and his salesmen sold was sufficient to keep them fully employed during the year in the performance of the service which he renders (R. Vol. II, p. 877).

The testimony shows without exception that trucked-in livestock is more difficult to handle than shipments arriving by rail. The table (R. Vol. I, p. 76) shows the rapid increase in the proportion of trucked-in to rail receipts. The practice adopted by the government of reducing trucked-in livestock to carload equivalents is erroneous. Such a method does not reflect the evidence of work necessary to sell livestock. The number of sales and the size of the drafts measures the work and is the proper method of cost determination (R. Vol. II, pp. 909, 946). Government counsel had full knowledge of the different conditions existing at Chicago in this respect as compared with those existing in Omaha at the time of the hearing in *Tagg Bros.* v. *U. S.*, 280 U. S. 420.

D. L. Swanson, a witness called by the Government was the manager of the Chicago Producers, a co-operative, which firm handled the largest volume of business on the Chicago market during 1932. He testified (R. Vol. II, p. 607):

> "Our volume was great enough to demonstrate efficiency in the matter of performance of the men engaged in the business. Our business is substantially as great as the entire business at Oklahoma City; and it was as large, or almost as large, as the entire business at Wichita, so that we have in this instance a firm as large as the total business done by all agencies at these markets. The only record we have kept as

to actually what our individual salesmen do in the way of volume of performance is in the personal inspection and checking up and then on the averages. Our average per salesman in the cattle department was about 700 cars, 7 salesmen, and about 5,000 cars or equivalents (R. Vol. II, p. 608); * * * a figure which should not be regarded by comparison as one to be obtained by a smaller firm which would not admit of such diversity. I think in our particular case we have a volume sufficient to produce the maximum in performance in connection with our employees."

The Secretary states in his findings (R. Vol. I, p. 139) that the salesmanship function "is one of the important items for which an allowance must be made in the reasonable unit costs." Appellants contend that he has arbitrarily arrived at a performance per salesman for association with a salary allowance, by the substitution of the "judgment principle", an invention of his own to avoid accepting results of experience, in his so-called efficiency salesmanship theory. He has erred in refusing to adopt the actual performance of salesmen to measure quantitatively the work which it is fair to expect in handling supplies of livestock. He had the correct average of salesman for each firm and for each species—cattle and calves not being separately calculated. (Respondents' Exhibit 12, schedule 24-a.) He has done even greater violence to the renowned skill of these men in dealing with them qualitatively, whether they be owner salesmen or employed salesmen. The Secretary refused at all times to recognize the incontestably proven fact that high head sale performance was almost invariably the direct consequence of favorable conditions of operation, notwithstanding the testimony of witness after witness to that effect. The testimony regarding the analysis of sales, explains beyond the possibility of contradiction that low performance did not arise from any lack of efficiency on the part

of the salesman, but from a multiplicity of necessary sales, which factor was greatly diminished in the case of high head performances.

This condition constituted one of the features which definitely distinguishes this case and the *Tagg Bros.* case. This matter of varying performance is further explained by the rapid change from rail to truck receipts together with the large reduction in the number of head which may be sold in one lot. This is a further distinction between this and the *Tagg Bros.* case. The deceptive part of the findings dealing with opinions which were expressed regarding sales ability of salesmen is: many low-volume salesmen, probably could have sold the same large number as were sold by the salesmen of high performance; but, the high performance salesman could not likely have sold any greater number of the type of receipts disposed of by the salesmen of low performance.

The difference in performance may be accounted for on no other hypothesis than the proven difference in the number of sales necessary to effect a clearance. Furthermore, any other hypothesis would be a slur on the providential nature of these employers of salesmen, for certainly it may not be presumed that they would employ four or five salesmen to do the work of two salesmen, or that two salesmen could do the work of four or five.

L. W. Conover, the principal owner of Alexander Conover and Martin, testified that he had been in the live stock commission business at Chicago for over forty years and had been selling cattle at Chicago for over forty years (R. Vol. II, p. 952). He explained that if his business came to the market in the same way in which the business of "Firm 42" arrived, he would either have to have more salesmen or would have to just get a ticket for them instead of selling them. He had an average of 884 carloads

per salesman, using six salesmen. The fact that it takes one salesman all day to sell one carload broken up in fifteen or twenty pieces would not indicate that the service he renders to the shipper is not worth the price that he charges. As the number increases, it becomes more expensive. It takes more time and effort and more salesmen (R. Vol. II, p. 957). He stated (R. Vol. II, p. 962) it is harder now to operate and manage a business than it has ever been in his forty-odd years.

Respondents' Exhibit 12, Schedule 16 and Schedule 24, show that The National Live Stock Commission Company sold

5,214 cars of cattle and calves
5 salesmen were used
23,898 drafts
1,043 average cars per salesman

Walters & Dunbar Commission Company.

3,189 cars of cattle and calves
6 salesmen were used
17,104 drafts
532 cars per salesman

Schroeder Commission Company.

628 cars of cattle and calves
4 salesmen were used
4,091 drafts
157 cars per salesman

Stockmen's Commission Company

1,375 cars of cattle and calves
5 salesmen were used
12,875 drafts
318 cars per salesman

Silas Palmer Commission Company.

1,395 cars of cattle and calves
4¼ salesmen
15,476 drafts
328 cars per salesman

Swiney Brothers Commission Company.

673 cars of cattle and calves
3 salesmen
6,088 drafts
226 cars per salesman.

This demonstrates the wide variation in the amount of work done in order to dispose of a carload equivalent.

Mr. Schroeder has been selling cattle for 25 years (R. Vol. II, p. 915). He stated that on most market days his salesmen were busy selling his mixed stuff, requiring a large number of sales to dispose of the number of animals handled. (R. Vol. II, p. 917.) He gets to the yards at six o'clock on Monday morning and at seven o'clock other mornings. His other salesmen get out earlier; they work until they get through. If they finish in good season they get through around four or five o'clock in the afternoon, but where there are lots of drafts to handle they work as late as eleven o'clock. The greater the mixtures, the greater the number of drafts, the longer it takes to handle the work in the yards as well as the work in the office.

Charles Dunbar, who has been working in the yards for 39 years, joined his firm as a partner 25 years ago (R. Vol. II, p. 508), was asked the following question (R. Vol. II, p. 515):

> Q. Now, Mr. Dunbar, based on your experience over the course of years, I want you to take conditions as you find them throughout a calendar year; I will ask in your opinion how many car lots of steers, single owner, to a car, in your judgment, you could sell if you had all that you could sell?
>
> The Witness: All I could sell, is the only answer I could answer, if I had all I could sell.
>
> Mr. Miles (Continuing): If you had all the supplies that you could handle, as many car lots as you could handle, how many do you think you could sell?
>
> (Objected to by counsel for appellants; objection overruled.)
>
> The Witness: There has never been two days alike

in all of my 39 years' experience in the yards that I can recall and it would be utterly impossible to tell you whether to-day I could sell two or twenty, or 200 or 2,000 carloads that day.

Mr. Miles (Continuing): And, for that reason, I have taken it over the course of one year, not for a single day.

A. Taking it back for one year and I can't strike an average. That is utterly impossible for any mind to grasp, comprehend and give a definite answer.

At R. Vol. II, p. 523, Mr. Dunbar stated that a larger number of owners, and a smaller volume of business has been going on for a number of years; that they have had a considerable increase in the amount of truck business, which formerly came by rail. Also that their salesmen probably handled about all they could and do it efficiently, considering the way the cattle arrived into the Chicago yards. He considered the salesmen of Walters and Dunbar very efficient in every respect and there were days when they worked almost beyond their limit to accomplish the sales they did during the year 1932. He said he would grant there were days when they did not have heavy receipts, but that was due to the country not shipping them in and distributing them in a more even manner; that you have to carry a force of men to handle peak day business, but you can't figure on a peak day coming just occasionally.

T. E. Swiney, one of the partners of Swiney Brothers, who has been engaged in the commission business about forty years (R. Vol. II, p. 728), testified that if the record showed that his firm sold 673 cars of cattle during the year, with three salesmen, an average of 224 cars per salesman, that he did not believe that the business could have been done properly and his constituents been properly served by fewer salesmen than were engaged during 1932. (R. Vol. II, p. 730). He stated at (R. Vol. II, p. 733) that he did not believe in looking back over the business that they could reasonably have been expected, through the exercise of

proper forethought, to have spent less money in the conduct of their business in serving their customers than was spent; that he did not recall any individual item or any item of expense that was not warranted by the circumstances.

When it is found that a theory depends for its validity upon entirely unnecessary assumptions, the theory has not gone to the roots of the problem. The entire theory of the Secretary appears to be an attempt to set up fanciful standards that have little or no relation to the actual experience of expert salesmen and owners with wide reputation and distinction. He has thus refused to adopt the experience of the market.

Governor Howard M. Gore of West Virginia, who was one of the arbitrators, and later Secretary of Agriculture in the cabinet of President Coolidge, later Governor of West Virginia, and at the time of testifying, Commissioner of Agriculture for the State of West Virginia (R. Vol. II, p. 1136), testified that he would accept the performance of the average salesman in the Chicago market as evidence of a sufficient performance to justify the making of a rate; *and that a carload of livestock does not represent to him a unit of work, nor a fair basis for arriving at the amount of work; that it may not be said with fairness that a man must sell a given number of cars of livestock in a given length of time; that is not a true yardstick at all.* (R. Vol. II, pp. 1148-1150.)

Hog Salesmen.

There is a considerable spread in the average number of cars sold by salesmen for the different firms. (Resp. Ex. 12, Sch. 24-B.)

The Secretary explains that he has associated the selling of 87,000 head of hogs and above with a salary of $3,600 and above, (R. Vol. I, p. 150). Using 82 head as a basis

for arriving at the number of cars, shown at top of page 147 R. Vol. I, he would associate 1,060 cars or car equivalents to the sum of money shown.

In the case of hogs there was not a single firm whose salesmen averaged, in 1932, over 1,060 cars of hogs for the year. The highest average was 903 cars; and the average of all the appellants was 385 cars. The Secretary would pay to a hog salesman who sold three times as many hogs as the average a salary of $3,600 or $588.93 less than the amount actually paid, namely, $4,188.93 average. (Respondents' Exhibit 12, Schedule 24-B.)

Swanson, Gilmore, and Castenholz sold 1,299 cars or car equivalents during the year 1932. They used three salesmen or an average of 433 cars per salesman, slightly above the market average. Mr. Gilmore was on the witness stand (R. Vol. II, p. 933) and at pages 934 and 935 indicates the kind of hog business and the methods which have to be employed in sales in that business. Mr. Gilmore's testimony throughout is a complete justification for the use of three salesmen to sell the amount of hogs in a year which the Secretary concludes should be sold by one salesman drawing a salary of $3,600. One of the employed salesmen, Mr. Mahoney, drew a salary of $4,804.85 and the other salesman J. F. Gilmore drew $3,400, or $8,204.85 for the two employed salesmen. Mr. Mahoney, one of his salesmen, has been with the firm selling hogs for over twenty years. Mr. A. Gilmore, the owner, who has been selling hogs on the Chicago market for forty years, (R. Vol. II, p. 936) states that three salesmen were far more necessary with 1,299 cars of hogs to sell at the present time than one salesman with five times that many hogs fifteen years ago. He stated that the salesmen are working faithfully and that it is possible they could have sold more if they had had room to handle them in; that some days they could have

and that that some days it would have been an impossibility. The day the witness testified he did not sell out all of his hogs. On the early market a few hogs sold steady and later the market was five to ten cents lower, and closed very dull at the decline, with a good deal of underweight bottom stuff at more than decline and hard to move. His firm carried over one load of hogs unsold that arrived early in the morning, had had the benefit of the shipper market and the late market. He did not receive a satisfactory bid for them.

When questioned as to the average of 433 cars per salesman (R. Vol. II, p. 937) Mr. Gilmore stated that the efforts and the work that every individual puts forth now in proportion to the amount of business that they handle is easily five times what it was ten years ago.

He said that on the previous Tuesday, as an example, he had gotten to the yards at seven o'clock in the morning and that they had a large amount of picayune truck stuff, a lot of it; that the salesman got to the house from the hog alley at four o'clock with a large number of scale tickets; that he left the office that night at a quarter to twelve.

This witness writes a letter to each owner; dictates letters and also writes them himself on the typewriter; (R. Vol. II, p. 939). On the Tuesday in question, (by referring to his yard book which he had with him) there were 301 hogs with about fifty ownerships represented. Included in that number were five rail cars and three pieces of loads arriving in single deck cars. There were 245 head in the five loads and three pieces. There was one load with 33 head in it. The hogs were sold at two minutes to three, (R. Vol. II, p. 941), and weighing finished about four o'clock when the salesmen went to the office. All employees worked that night until eleven to eleven fifteen. The owner worked until a quarter to twelve and had his supper at 12:30 A. M. (R. Vol. II, p. 942.)

This witness, Gilmore, and his partner, lost $1,200 apiece for 1932. (Petitioners' Exhibit 2; R. Vol. I, p. 266.)

The Secretary states in his review of the performance of hog salesmen (R. Vol. I, p. 145) that H. W. Dye, a salesman for Dolan Ludeman sold all but five percent of the 79,505 hogs received by that firm. Respondents' Exhibit 12, schedule 24-C shows that Dolan and Ludeman sold 996 cars or car equivalents or an average of 797 cars per salesman in 4,235 drafts. The average is brought about by using a salesman less than a full year.

The same exhibits reflect that Swiney Bros. sold 1273 cars with an average of 637 cars per salesman in 9,814 drafts. Mr. Swiney on the stand approximated that he sold five-eighths of the receipts and the other salesman sold three-eighths (R. Vol. II, p. 738).

The record discloses that hogs do not come to the market so that a salesman may "sell ten loads of butcher hogs a day where each load belongs to a different owner" (R. Vol. II, p. 1045). There were 15,545 cars of straight car single ownership hogs (Table, R. Vol. I, pp. 130-131) received at the Chicago market during the year 1932. A small proportion of them would be straight loads of butcher hogs. Using this testimony as a basis for salesman performance in selling hogs, it would only be necessary to employ five or six salesmen to sell the entire 1932 receipts, whereas excluding the owners who sold hogs, there were sixty-one salesmen (R. Vol. I, p. 148). What has been said in regard to the methods employed by the Secretary in reaching his theoretical performance to associate with $3,600 is equally applicable to his theoretical performance and theoretical salary in the case of hogs. The record does not support such a theory.

Sheep Salesmen.

In the case of sheep, the Secretary's requirement deemed to be reasonable, is that a salesman should sell 270,000 head or 1,035 cars per year. This performance is associated with a salary of $4,000. Actual performance in 1932 was less than half as many cars per salesman, namely 465.*

Of the appellants selling sheep, only two had a salesmanship performance equaling that required by the Secretary to be reasonable. The average salary paid to sheep salesmen in 1932 was $4,451.13.*

The Secretary having rejected the pragmatic test of the experience of the market in his requirement of performance, only two appellants having reached the goal required, he was compelled to look elsewhere in support of his findings.

The Secretary found (R. Vol. I, p. 145):

> "127. A witness who is a representative of a live stock producers organization and has had extensive experience in shipping livestock to central markets stated that he had seen one salesman sell 18 or 19 double-deck cars of sheep in one day. His observation covered consignments containing as much as five or six cars each and he stated that it would in his opinion require more time to sell the same number if they were single car consignments than if they were consignments of five or six cars."

F. R. Marshall, the witness referred to (R. Vol. II, p. 384) is the Secretary of the National Wool Growers' Association. He testified that he is part owner of a sheep outfit located in the State of Washington which ships twenty to twenty-five cars per year to the St. Paul and Chicago markets; that he had not seen the audits made by the government representatives from the books of these respondents in this proceeding. He said that he did not keep a

* References: Secretary's order, Respondents' Exhibit 12, Petitioners' Exhibit 9.

diary but said that he had been in Chicago four to five times a year from one-half day to one day and a half; that he does not visit every pen or salesman while at Chicago, but tries to look at what is going on and see their difficulties, and see their side of the case, and that he knows they have difficulties.

Mr. Marshall was asked from his experience and observation what, in his opinion, would be a reasonable performance to expect of a good sheep salesman on the Chicago market, how many carloads in a year. Objection was raised that a proper foundation had not been laid for asking the question and the witness was not properly qualified, the objection being overruled. The witness then gave his observation. He said from his own observation that one concern has sold around possibly 18 or 19 cars, some time the first part of September 1931.

"Mr. Dagger: Was that all done by one salesman?

A. Well, the actual selling, my recollection was, well, that salesman, I think, the one particular *salesman had an assistant,* I don't know. I never hang around close when there is a deal going on. I think it is good business to be out of hearing.

Mr. Boyd: Did I understand you to say W. R. Smith and John Clay & Co., and handled by one salesman?

Witness: Two different firms handled numbers of sheep such as I have spoken of.

Mr. Boyd: On the same day?

Witness: Yes, sir.

Mr. Boyd: And the same number of consignments by each firm?

The Witness: By each firm. I said I knew they handled up to three consignments amounting to *15 to 16 cars* that I recollect of (R. Vol. II, p. 390-1). * * *

Mr. Boyd: How many salesmen were there?

* * * * * *

The Witness; I said, Mr. Boyd, that there is a head salesman, I was saying, just as I was interrupted, that I do not make it a point, in fact, I make it a point not to try to tag a salesman around when the buyers are in the alley,—whether or not his assistant took any part

in making that sale to the packer buyer or of selling the seconds to the packer or the thirds to the feeder, I do not know. I know he was in the alley with the head salesman, giving some help to the yarding and showing of the stuff, but just what part he actually had in the sale, I cannot say." (R. Vol. H, p. 391.)

From the Secretary's findings:

"Another witness, who is a sheep salesman, stated that he had sold as high as fifteen carloads of sheep in a day alone and unaided." (R. Vol. I, p. 145.)

Lee Merrion, the witness referred to (R. Vol. II, pp. 425-6), testified that it would be an exceptional case where he would be called upon to sell fifteen cars in a day. That it would be difficult for a salesman on this market to accomplish. In the second place, it would be impossible to get the receipts.

All of the principal sheep salesmen at the Chicago market explained their activities in detail, and there is absolutely nothing in the record of testimony to justify a deviation from the market average of 465 cars per salesman (Respondent's Exhibit No. 12, Schedule 24-C). There were 23.34 full-time salesmen employed on the market during the year 1932, at an average salary of $4,451.13 (Respondents' Exhibit 12, Schedule 24-C).

Sheep commission business in some respects is different from that regarding cattle and hogs. The firms of John Clay & Company, W. R. Smith & Sons, and Merrion & Wilkins have a sheep commission business at most of the public markets where sheep are handled in large quantities at markets west of Chicago. John Swanson (R. Vol. II, p. 397), J. C. Eastes (R. Vol. II, p. 949) and James L. Merrion (R. Vol. II, p. 410). In the western sheep feeding section the bands of sheep are larger than they are when compared to the quantities raised by cattle and hog raisers. The firms of W. R. Smith & Sons and Merrion & Wilkins handle sheep and lambs exclusively. John Clay & Company

handle more sheep and lambs on a commission basis than any other organization in the country although they handle cattle and hogs as well.

John Clay & Company sold 514,283 head at Chicago in 8,086 drafts (Respondents' Exhibit 12, Schedule No. 4, Firm No. 18, Sheet No. 18, and Schedule No. 16, Sheet No. 1).

Merrion & Wilkins sold 519,091 head (same exhibit and schedule, Firm 57) in 7,870 drafts (Exhibit 12, Schedule 16, Firm 57).

W. R. Smith & Sons sold 269,367 head (Respondents' Exhibit 12, Schedule 4, Firm 90) in 5,961 drafts.

Each of the three firms had 2 salesmen. The total number of head handled by these 6 salesmen was 1,302,741 head in 21,899 drafts. All other salesmen doing business on the market, 17 in number, sold 1,103,264 head in 54,129 drafts. The 17 salesmen averaged 3,223 drafts per salesman. The 6 salesmen averaged 3,649 drafts per salesman.

The 6 salesmen doing more than one-half of the business on the market averaged 217,123 head. Their average salary was $6,666 (Respondents' Exhibit 12, Schedule 24-C). Their evidence shows that the sheep business at the Chicago market of necessity fluctuates very severely throughout the months of the year. In the neighborhood of 75 per cent of the total volume is marketed at Chicago during the 5 months of the year, December, January, February, March and April (R. Vol. II, p. 410).

One of the large sheep firms had fourteen times as many sheep to sell in January, 1932, as it did in July, 1932 (R. Vol. II, p. 410).

John Swanson, sheep salesman for John Clay & Company, testified that he could not say how many cars of sheep he could sell in a year (R. Vol. II, pp. 402-403).

The Government called three witnesses who were sheep

salesmen, Messrs. Swanson, Merrion and Marsch. In reading their testimony it is not possible to determine how many carloads or head they might reasonably be expected to sell during the year at Chicago.

The respondents called three witnesses, Messrs. Barsoe, Eastes and Burns. They did not estimate the amount of business that they might reasonably be expected to transact in a year or in a day, so as in the case of other livestock, there is no evidence in the record upon which the Secretary could base an estimate as to what might reasonably be expected of a sheep salesman at the Chicago market, so far as his performance is concerned.

Jas. L. Merrion, one of the partners of Merrion and Wilkins, states (R. Vol. II, pp. 422-423):

> "It would be impractical to attempt to reduce the organization, so far as skilled men are concerned, during the periods of light receipts and increase them in periods of heavy receipts. You could not find them in periods of heavy receipts." * * * "The length of time it takes a person to perform a given duty depends somewhat upon the characteristics of the individual performing the service; one may be lazy, one may not, one may be less active physically, the other may be slower, one may be less active physically and still be able to perform service more rapidly due to his familiarity with it. The fastest man in the performance of his particular function that Mr. Miles has inquired about might not serve in that instance the shipper as well as the man that might proceed more slowly, and the reverse may be true. The conditions on the Chicago market change fast at times.
>
> It would be difficult for me to enumerate the varied conditions that prevail throughout even one market day, without attempting to estimate or describe that multiplicity of obstacles that confront me in the performance as a salesman on the market of the great size of the Chicago market."

It follows that it was not possible either from the record of performance of the 3 firms, who had the greatest oppor-

tunity to operate at reduced costs by reason of their activities, for the Secretary to have found fairly either from the record or from the oral testimony, that it would be reasonable to expect salesmen to obtain a salesmanship performance of 270,000 head annually. The average salary paid all salesmen was $4,451.13 (Respondents' Exhibit 12, Schedule 24-C, Sheet 2), and the average salary of the 6 salesmen performing average sales of 217,123 head was $6,666 as against $4,000 fixed by the Secretary (R. Vol. I, p. 150).

It is very evident in determining the amount of salaries associated with a given performance that the Secretary has disregarded the evidence. We submit that he should have had regard to the very complex gradation of natural gifts and aptitudes in moral, intellectual and physical respects and should have recognized that in this business, to a less extent perhaps than in others, the total gamut is represented from those who are exceptionally reliable, energetic, ambitious, intellectual, efficient, to the opposite extreme, all accentuated by wide differences in education and training.

The Secretary and his aides devoted a lot of time and space in the record attempting to get witnesses to compare their capacities and capabilities with others, quite naturally with little or no success, apparently losing sight of the fact that these men are not trying to make records for speed in making sales, but attempting to get a price which will produce the greatest number of dollars and cents for the livestock they sell for their customers, and that in so doing these men are establishing every market day, the base price for all live stock sold in the United States.

The allowance for costs of business getting and maintenance is the substitution of the Secretary's judgment for that of the prudent management of the owners. There is no evidence in the record of waste or extravagance.

Business getting and maintenance is the term used by the Secretary and the market agencies to describe generally the different methods used to attract business (R. Vol. I, p. 119). The methods generally used may be designated as personal contact rather than advertising. Commission firms issue market letters to their customers varying in size and containing information upon prices at which various grades and classes of live stock have been sold and general market conditions (R. Vol. I, p. 119). Special circulars are issued by some firms, on occasion. By keeping account of customers and their special interests, the circulars are prepared for distribution at times when the customers are most interested in information regarding the market (R. Vol. I, p. 120).

The Chicago Daily Drovers Journal is a daily market paper published at the stockyards. Many of the commission firms subscribe to this paper for customers who ask for it and who have sufficient business to justify the expense (R. Vol. I, p. 120). The Secretary found that there was very little entertainment of customers, the rules of the Chicago Live Stock Exchange prohibiting it (R. Vol. I, p. 120).

Representatives of the commission firms make trips to the country to visit their customers. The purpose of these trips is not only to keep up friendly relations with customers but to advise in regard to the feeding and time of marketing and to appraise the livestock. The Secretary found that many of these trips, which usually occur during the week end when work in the yards is slack, are made at the request of customers who have livestock about ready

for the market, and who desire a salesman's judgment as to their fitness (R. Vol. I, p. 120).

Business getting and maintaining is discussed in the Secretary's findings in Paragraphs 81-86 (R. Vol. I, pp. 119-121); and in Paragraphs 139 to 145 (R. Vol. I, pp. 160-167).

The Secretary found, Paragraph 145 (R. Vol. I, p. 166) that a reasonable unit cost for business getting and maintenance to be covered into rates, should not exceed 9 per cent of the total costs found. This allowance is, therefore, 3.90c per head for cattle and calves; 1.20c per head for hogs; and 0.5c per head for sheep. These figures are intended to cover non-salary expenses for business-getting and maintenance. The commission firms have no regularly employed solicitors; it is the owners or salesmen who make the country trips (R. Vol. I, p. 163). In other words, business getting and maintenance expenses covered into costs for that function are the actual cash outlays in addition to the salaries of salesmen who make country trips, and in addition to the salaries of those employed clerically to compile and maintain customers' lists, prepare circular letters and the like.

The lack of relationship of the allowance made by the Secretary as reasonable business getting and maintaining expenses per head for each species is shown by the Government's own figures.

Paragraph 144 of the Secretary's findings (R. Vol. I, pp. 163-166) shows in tabular form the unit cost per head of non-salary expenses for each species for business getting and maintenance for the year 1932. These tables show that of the 84 firms selling cattle and calves, 63 had actual costs per head for business getting and maintenance in excess of the 3.90c considered reasonable by the Secretary; and only 21 had equal or less actual cost per head than the

3.90c. The median actual cost per head was over 6c, or 2c more than the amount considered reasonable by the Secretary.

In the case of hogs (R. Vol. I, p. 165), 70 firms out of the 85 who sold hogs had business getting and maintaining expenses in excess of the 1.20c allowed by the Secretary as reasonable; and 15 of the 85 firms had lesser cost per head. The median cost as shown in the Secretary's compilation at page 165 of the record is 2.33c. This expense was incurred by a firm as the table shows, which did a very large volume of business in hogs and yet the business getting and maintaining expenses per head was almost twice the amount considered reasonable by the Secretary's mandate. It seems significant that a firm which is shown throughout the record to be one of the most efficiently and economically conducted businesses on the Chicago market finds it prudent and wise in the judgment of its managers to expend almost twice as much for business getting and maintenance, in the case of hogs, as the Secretary deems wise.

In the case of sheep, only 6 firms out of 84 engaged in selling sheep had business getting and maintaining expenses per head within the range held reasonable by the Secretary. The median expense was 1.15c per head, a figure over twice that held reasonable by the Secretary (R. Vol. I, pp. 165-6).*

In the case of each species, an observation of the tables referred to on pages 164, 165 and 166 of the Record reveals that the firm incurring the least for business getting and maintaining, in general, did the least business.

There is no evidence in the record of waste or of extravagance, in business getting and maintenance expenses. Most

* The per head expenses for business getting and maintenance in the case of sheep is headed by the figure $1.0001 in the Record (p. 165). This is obviously an error in printing. The original order gives this figure as $.0001, a difference of $1.00.

certainly no presumption could exist that business management will expend sums in their judgment unnecessary. All business history teaches to the contrary. The administrative fiat of what is the reasonable per head cost for each species for this service and function must, therefore, have some foundation in the record. As we have shown above, there is no foundation in the actual experience at the market; and the absence of any evidence in the record that there were wasteful or extravagant expenditures, completely removes all support from the costs found to be reasonable by the Secretary, for business getting and maintenance per head. The Secretary's arbitrary judgment cannot support a finding. The only evidence in the entire record to justify the Secretary is not on wastefulness or extravagance but is the testimony of two representatives of livestock producer organizations,* who expressed the opinion, as abstracted by the Secretary (Findings, Paragraph 139, R. Vol. I, p. 160) that commission firms were entitled only to keep their names before the public and that rate payers should not pay through rates anything whatsoever to cover business getting expenses.

The function of business getting and maintenance is not only to secure and retain business but to serve the shipper of livestock.

Contrasted with the testimony of the two witnesses relied upon by the secretary is that of the owners themselves. From their testimony it appears that:

* Mr. F. E. Mollin, Denver, Colorado, Secretary of the American National Live Stock Association (R. Vol. I, p. 312-3). The bias of this witness is shown by the fact that his Association had adopted a resolution (R. Vol. I, p. 309) demanding that rates be reduced but who testified that he did not know what the rates were (R. Vol. I, p. 318). He further testified: "I have no information with reference to cost of rendering service at Chicago" (R. Vol. I, p. 319). The other representative whose evidence the Secretary relies upon is F. R. Marshall, Salt Lake City, Secretary of National Wool Growers' Association. He objected to "an allowance for expenses to the commission man in getting business and in maintaining the volume of his shipments which he receives to sell" (R. Vol. II, p. 387). He did not know what the actual expense of business getting and maintaining was, however (R. Vol. II, p. 392).

1. Solicitation is a service to the shipper of livestock.

2. Solicitation is to secure and retain business.

3. No unwarranted or extravagant expenditures were made.

Charles Dunbar, one of the proprietors of the firm of Walters & Dunbar, testified as follows:

> "Our other salesmen and I go to the country to examine livestock at the request of the owner, and we pay the expenses. Walters & Dunbar pays all the expenses when making such trips, and our salary included with the expense. As to my opinion as to the value of that character of service to the man who receives this,—to the owner of the livestock it is invaluable. It would be impossible to get an estimated value definitely because when you go to the country to confer with a man about his cattle, he may have a particular kind of cattle in his feed yard that, at the present time, would be selling exceptionally well, and just the opposite, there might not be a good demand at that time. Then, after you return from your trip, you have his cattle in mind, and you can order the cattle in on a market that will justify his coming at that particular time to obtain the most money for them. It is an invaluable service to the feeder of cattle, to have a commission man go out, and confer with him and watch the market, help him get his cattle in on a favorable market. Patrons that we serve in that manner expect it. * * * I have had many of them offer to pay my expenses for coming down." (R. Vol. II, p. 525.)

Further, this same witness testified that the amount expended by his firm for business getting and maintaining was "absolutely necessary," and "very moderate in the charges and expenses." (R. Vol. II, p. 534).

The per head non-salary expenses for each species of livestock of Walters & Dunbar for 1932 were higher than the amount allowed as reasonable by the secretary (Firm No. 45, R. Vol. I, p. 164-6).

The witness David Swanson, manager of Chicago Pro-

ducers Commission Association, a co-operative organization of farmers and shippers, testified on direct examination for the government, stating:

> "Naturally, I feel that the money that we have expended for advertising or soliciting, as I have heretofore described it, was neither extravagant nor excessive, but was the result of the exercise of sound judgment. I do not feel that in such expenditures we engaged in extravagances. We might have slipped once in a great while and spent a little more. We spent no more than would be expected in a business of this sort." (R. Vol. II, p. 606).

The business of Chicago Producers Commission Association, managed by the witness Swanson, is substantially as great in volume as the entire business in the yards either in Oklahoma City or in Wichita, Kansas (R. Vol. II, p. 607). This is a firm owned and managed by shippers and producers of livestock. *The expenditures of this mutual or co-operative corporation for business getting and maintenance is the most eloquent evidence in the entire record, not only as to what managers think are economical expenditures, but what the shippers and producers themselves authorize.* In the record the Chicago Producers Commission Association is known as firm 100. Its per head non-salary business getting and maintaining expense for 1932 for cattle and calves was 13.37¢, a figure two and one-half times that considered to be reasonable by the secretary (R. Vol. I, p. 164). For hogs, the non-salary per head business getting and maintaining expenses were three times the amount allowed by the secretary as reasonable (R. Vol. I, p. 165); and for sheep, almost four times as much.

Edward J. Lawler, one of the proprietors of Lawler Brothers, testified that under his direction his firm reduced expenses all along the line in 1932 (R. Vol. II, p. 874). He stated:

> "I do not believe that I spent or that my employees spent any more money in the year 1931 or the year

1932 than should have been spent in the exercise of good sound business judgment. * * * The matter of travel and solicitation is carried in a separate account in our books, and it gives considerable detail as to expenses. After the expenditures are incurred, I make a careful examination to determine whether or not in my judgment the expenditures are reasonable. I exercise a very careful supervision over that matter, and from the information I obtain from those inquiries I am able to say that those expenses, in my judgment, were both necessary, and the amount spent was not unreasonable." (R. Vol. I, p. 874-5).

The non-salary business getting and maintaining expenses for 1932 of Mr. Lawler's firm, number 51, substantially exceed the allowances held reasonable by the secretary; indeed in the case of hogs and sheep the secretary's reasonable allowance is almost doubled. (R. Vol. I, p 164-166).

E. G. Fulkerson, president of National Livestock Commission Co., testified:

"I find that our force does not have time to comply with all of the requests that come to us to visit their feed lots. Lots of times we cannot go when we have requests. It is natural for us to attempt to have solicitors not only to see and appraise cattle, but solicit any other cattle that may be in the neighborhood ready to ship. I consider that most of the business that comes to us is account of our service, and our service when we sell their stock, and also in keeping them posted and in keeping in personal contact with them. While our reputation and our service may be of the best, it is necessary to expend a sum of money for soliciting and in keeping them constantly posted as to the markets. We cannot just stop. If you do, your business slips." (R. Vol. II, pp. 768-769).

The same witness, Fulkerson, further stated:

"I think that all of the solicitation that we did and all the trips we made were warranted, and I might also add that I think they were profitable to us when we made them. I have several requests at the office now for me to come to the country to see cattle in different

spots at this time. I have a letter from G. B. Carpenter at Hamburg, Iowa; he and his son feeds about 800 cattle each year and I have a date to go out, he wrote me and asked me to come out on the eleventh of August. Mr. Morgan Bohart at Plattsburgh, Missouri, has also written me to come down there; he feeds about 1,200 and I have other various letters there. I make a trip to each of these places each year and they look forward to it and expect me and I might also add that it never costs me a cent on earth for any automobile hire when I go to those places. They meet me and take me all over the country and are tickled to death to have me come. As to whether I agree with Mr. Marshall of the Wool Growers, the people that I go to see do not feel there is too much solicitation, they always have a good chicken dinner for me and everything and they are glad to have me and always ask me to come back." (R. Vol. II, p. 772).

The non-salary business getting and maintaining expense for the year 1932 of Mr. Fulkerson's firm, number 66, exceeds the allowance of the secretary for each species of livestock (R. Vol. I, pp. 164-166).

Testimony of the kind and to the same effect as that quoted in the paragraphs above could be multiplied indefinitely from the record. *Every owner or manager, testifying on the question of business getting and maintenance, without exception, stated that the expenditures made by them for this function were, in their judgment, as owners or managers, warranted and necessary.*

The Secretary did not consider competition with other markets nor direct selling to Packers.

The Secretary's apparent position is that the business of the appellants is a monopoly and hence that they are entitled only to keep their names before the public. It is an erroneous premise that the appellants have a monopoly. There is keen competition among the appellants themselves as to the services which they render. In addi-

tion, there is competition with other markets and with direct buying.

There are at least six other central markets in the Middle West. The answer of the Secretary admits that in ten years the percentage of cattle and calves handled by Chicago agencies diminished from 42.4 per cent in 1923 of the cattle and calves handled at the seven central markets of the Middle West to 33 per cent in 1932. Making the same comparison for the same period in the case of hogs, the decrease has been from 53.5 per cent to 42.2 per cent; and in the case of shipping, the diminution has been from 39.1 per cent to 29 per cent.

The Secretary failed also to give consideration to the fact that direct shipment of livestock to meat packers without intervention of market agencies is increasing. This presents not only a serious problem to the appellants as to the volume of business handled, but a more serious one to shippers of livestock. Market agencies are the medium through which livestock shippers obtain the highest market prices for their produce. The salesman of a market agency deals with the buyer from the packers at arm's length. So small a difference in price as 5c per hundred pounds makes a difference of $12 to the shipper of a car lot of cattle (R. Vol. II, p. 526).

The answer of the Secretary admits that the direct receipt of hogs by packers has increased from 4.56 per cent of the total number of hogs received at the Chicago yards in 1922 to 34.15 per cent in 1932. During the same period the totally directed consigned sheep receipts more than doubled from 13.52 per cent. For cattle and calves the increase in direct buying is less.

When direct buying has increased to such a proportion that the efforts of the shippers' representatives at the Chicago Yards are no longer effective to keep the direct

buying price from dropping below the amount obtained by a salesman minus the market agency's commission, shippers and producers of livestock will be entirely at the mercy of the packers in respect to prices, because there will then be no effective competition. Business getting and maintenance is essential, not only to the survival of the appellants but also to the beneficial interest of livestock producers and shippers. So when the Secretary says that the appellants are entitled only to keep their names before the public, because their business is monopolistic, and hence that solicitation expense should be curtailed, he is penny-wise and pound-foolish. The country trips not only are personal contact, but are of immediate value to the shippers as regards appraisals, the condition of the market, the sorting of livestock and the like; but this solicitation as well as the other media of business getting and maintenance are of more far-reaching importance in maintaining at the primary live stock market of the world adequate representation for the shippers.

The amount allowed by the Secretary for business getting and maintenance has no relationship to actual cost.

In a foregoing section of this Brief on business getting and maintenance, we have demonstrated that the amount allowed as reasonable by the Secretary for this expense has no relationship to the actual experience of the market. Three times in Paragraph 142 of his findings (R. Vol. I, p. 162), the Secretary states that the appellants are entitled only to keep their names before the public. This statement proceeds upon the false premise that the business of the appellants is a monopoly. There are at least three elements of competition: other commission firms, six other central markets in the Middle West, and direct buying. But more important still is the service to the shippers by the country trips, many of which, the Secre-

tary says, are requested by the shippers. On these country trips, not only is business solicited but customers are advised in regard to feeding and the time of marketing their livestock and their livestock is appraised (Par. 82, Secretary's Findings, R. Vol. I, p. 120). Also on the country trips to feed lots where sheep are rested and fed before being sent to market, commission firms see that the sheep are receiving proper attention and if requested to do so, make arrangements for having the sheep sheared and look after the selling of the wool without extra charge. (Secretary's Findings, Par. 83, R. Vol. I, pp. 120-121).

If the applicants are to be allowed to expend only sums necessary to keep their names before the public, that could be accomplished by general advertising and country trips would be prohibited, and all service to the customers incident to such trips. These services are such that customers volunteer to pay for them (R. Vol. II, p. 525); that customers make more requests for such trips than can be taken care of (R. Vol. II, p. 768); and that in the case of the firm handling the largest volume of business on the market, Chicago Producers Commission Association, the co-operative owners themselves incur much greater expense than the Secretary would allow (See Firm 100, R. Vol. I, pp. 164-166).

It is submitted that the Secretary's allowance for non-salary business getting and maintaining expenses is arbitrary and unreasonable, without relationship to the experience of the market, without foundation in the evidence, and the substitution of a personal judgment for that of the prudent management of the businesses.

Most significant is the testimony of the government's accountant, Bachman, who, testifying as to business getting and maintaining expenses, said:

> "We made no investigation to determine whether the amount so spent was proper or improper." (R. Vol. II, p. 702).

Nothing can make it more clear that the secretary's allowance of a figure which he thought was reasonable for business getting and maintenance was the imposition of his personal judgment, without any evidence in the record to support it.

Under the law no administrative officer can substitute his judgment for that of business managers.

In *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U. S. 63, 72, the Court said in respect to expenses to procure new business:

> "The commission did not question the fact of payment, but cut down the allowance to $5,000 a year on the ground that anything more was unnecessary and wasteful. The criticism has no basis in evidence, either direct or circumstantial. Good faith is to be presumed on the part of the managers of a business. * * * In the absence of a showing of inefficiency or improvidence, the court will not substitute its judgment for theirs as to the measure of a prudent outlay."

There is not a single line of testimony in the record that any expenditures made were extravagant or wasteful. The government's chief witness, Bachman, admitted that no investigation was made to determine whether the amounts spent were proper or improper (R. Vol. I, p. 702).

The evidence shows that business getting and maintenance is not only for the benefit of the commission firms, but for the benefit of the shippers themselves. The shippers desire it, even to the extent of offering to pay Walters & Dunbar for their expenses (R. Vol. II, p. 525); and even to the extent of paying for it out of a diminution of profits in the case of the co-operatively-owned Chicago Producers Commission Association.

The Secretary's method for determining the proper allowance for owners' salaries was unreasonable, was based upon an erroneous rule and is without foundation in the record.

The Secretary unreasonably considered reimbursement to cover management and to cover uninsurable risks to be profit.

In Paragraph 158 of the Secretary's order (R. Vol. I, p. 180), there appears the unit costs for each item or function of service of the market agencies.

To the total costs given in Paragraph 158, the Secretary adds profit, consisting of two items (1) to cover management; (2) to cover uninsurable risks.

The items to cover management and to cover uninsurable risks are erroneously considered as profits. The allowance for management is determined primarily from the experience of hired managers. To evaluate the services of owners solely on the basis of a hired manager puts the owner-manager on the same basis as a cooperative undertaking in which the risks are carried by the members of the concern rather than by the manager. It removes the primary incentive to ownership; namely, the prospect of pure profits or something above a manager's wages.

The error in considering a return for uninsurable risks as profits was demonstrated by the recent fire catastrophe at the Stock Yards (R. Vol. I, pp. 213-214), during which all of the records of the petitioners except those kept in fireproof safes, were destroyed. Among the items destroyed were customers' lists, the only portion of these being preserved were those names included in the impounding records filed with the Clerk of the District Court.

The economic motive of the work done in the commission business is the desire to make a profit. It is a well recog-

nized principle that if the entrepreneur himself acts to some extent as a salesman or a worker, and puts capital in the business, he may allow a certain sum based on prevailing prices, as payment for cooperation of these factors of production. It is only the remainder that represents the pure profit of enterprise.

This profit of enterprise is, at first sight, akin to a pure differential profit that is made merely as a result of the difference in cost in different undertakings. It includes, however, other elements which have an approximately definite price and which must, therefore, be regularly taken into account in the calculations on which a business is based. These prices must, therefore, be put on the same footing as costs, and must normally be covered by the price of the service.

To this class belongs, first of all, the personal work of the entrepreneur in his capacity of employer, in organizing and directing the undertaking. Work of this kind must clearly be reckoned among the costs of the undertaking. There is a price for these functions of enterprise in every economically advanced country. The relative scarcity of competent individuals in proportion to the demand for them is the primary determining factor of the price of the entrepreneur's work. The price of the entrepreneur's work must be included among the costs of the business and not treated as profit as was done by the Secretary in his findings (R. Vol. I, pp. 178, 179, 180). Thus, if an owner making an annual profit of $10,000 in his business can earn $7,500 as a manager or a salesman for another firm, his annual profit should be reckoned only as $2,500. If the net proceeds are only $5,000, it should be taken and accepted that he is really working at a loss, since his managerial or salesman ability is worth $7,500.

The whole organization of the business, the training and efficiency of the employees in their work, the interest of all

in the prosperity of the business, tend to consolidate the position of the firm. In many cases in this business the position is the fruit of a half century of endeavor, and the pure profit of enterprise now attempted is in part the outcome of the position which has been won. It can, however, be lost easily in the continual changes of the peculiar economics now current, which forces in even normal times are always at work to displace old and favorite firms and give place to new ones. Its maintenance necessitates a ceaseless effort—an unrelaxing vigilance,—in a word, exertions should be paid for, and the price must be included in the cost, and under no circumstances should these elements be regarded and set up as profits as was done by the Secretary in Section 158 (R. Vol. I, p. 180).

The record is clear that a well organized live stock commission business must in the very nature of things have a quite inflexible annual cost to the owner. The undisputed facts are that the owners in this business must employ their skilled talent on an annual basis which represents the greatest portion of their outlay. They must accept the hazards of the vicissitudes of the weather conditions, such as crop failures due to insufficient moisture, controlled production, blizzards, destruction of facilities in which they conduct their business by fire or storm, the whim or caprice of their patrons, bank failures, live stock epidemics, embargoes, tariff barriers, direct marketing to packers, control of live stock and feed production, labor troubles and any other hazard or factor which may cause sudden, temporary, prolonged or permanent decrease in business or increase in costs.

Cassel in his "The Theory of Social Economy" (1932) states:

> "A second element of the profit of the entrepreneur, in the broad sense of the word indicated above, which must be reckoned as a *cost*, is the risk—insofar as it

can be calculated with some degree of probability and so included in the estimate of cost." (p. 174)

"The same is also obviously true of the risk arising out of an unavoidable falling-off in sales. * * *" (p. 174)

II.

THE SECRETARY, IN PRESCRIBING REASONABLE COSTS, FOLLOWED NO WELL-KNOWN OR WELL-RECOGNIZED EXPERIENCE METHOD, PARTICULARLY IN RELATION TO THE PERFORMANCE AND SALARIES OF SALESMEN.

The secretary purports to follow methods of fixing reasonable costs employed in the Omaha Case, *Tagg Bros. & Moorhead v. United States* (280 U. S. 420). In paragraph 103 of the Secretary's Findings (R. Vol. I, p. 128) it is stated that that case decided that rates charged by market agencies should produce gross revenues sufficient to pay all reasonable costs and a reasonable compensation for management and risk. It is then announced that that statement is adopted as a guide in the present proceedings,

> "and it becomes necessary, therefore, to determine the reasonable costs to the respondents of handling each species of livestock." (R. Vol. I, p. 128.)

The determination of reasonable costs should have some relationship to experience regardless of the method employed to determine what the reasonable costs are. Particularly in respect to salesmanship, the salary of salesmen, the secretary's costs bear no relation to experience. Therein the *Tagg case* is no comfort or precedent for the secretary. In the *Tagg case* the secretary indicated that five thousand dollars a year was a reasonable salary for cattle salesmen when the evidence showed that only four out of thirty-nine such salesmen were paid that much per year (29 F. (2d) 755, Government's brief, *Tagg case*, p. 31). In the instant case, however, the situation is reversed.

Translating salesmen's salaries to a per head basis, the Secretary allows $.1667 for cattle and calves. The average cost on the Chicago market is $.4024. In other words, the finding of the Secretary as to what is a reasonable salary per salesman bore an actual relationship to the experience at the Omaha yards. Indeed it was higher than the average, for only four out of thirty-nine cattle salesmen received the amount allowed by the secretary as reasonable, and 16 received less than $3,000 (Government brief, *Tagg case*, p. 31).

If the method employed in the *Tagg case* had been utilized in the instant case, salesmanship salaries per head for cattle and calves certainly would have been at least the average of the market; viz., $.4024 instead of less than half that average amount of $.1667. *It is apparent, therefore, that in the Tagg case the Secretary endeavored to set the reasonable cost of the salesmanship function for cattle and calves at a figure for which the owners could employ salesmen; but that in the instant case, on the contrary, he used only his personal judgment as to what he believed a cattle salesman should receive, paying no attention to what the evidence shows the market agencies had to pay.*

We think it well, before pursuing the discussion of the findings made by the secretary in respect to costs, to review a few of the many cases in support of the rule announced in the Propositions of Law, that a rate-making body is not the financial manager of a business and is not empowered to substitute its judgment for that of the management of the business. The applicable general rule is well expressed in *State Public Utilities Commission* v. *Springfield Gas & Electric Co.* [291 Ill. 209, 234; 125 N. E. 891]:

> "The commission is not the financial manager of the corporation and it is not empowered to substitute

its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

See also *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U. S. 63, 72, quoted herein at page 75.

In the *Tagg case* the secretary did not ignore the amount paid to salesmen; in the instant case, he did. Nor is there any evidence in the record of any abuse of discretion or of any wastefulness in salaries paid salesmen. A salesman and his employer bargain at arms length. The secretary has no power to tell a market agency what it can or must pay a cattle salesman; and obviously the secretary has no control over what salesmen demand. The statute gives the secretary only regulative power over the market agencies; it gives the secretary no control over salesmen. An employer or a purchaser who must bargain at arms length gets in service or in value only what he pays for; and in this respect the livestock commission business is no different from any other.

In *Denver Union Stock Yard Co.* v. *United States* (57 F. (2) 735), before a Statutory Court consisting of Circuit Judge McDermott and District Judges Kennedy and Symes, in writing the opinion of the Court, Judge McDermott said:

> "The rule undoubtedly is and must be that the power to regulate rates does not confer upon the Secretary the power of management of the affairs of the corporation." (p. 747)

And again:

> "There is no rule of law that denies to the directors of a stockyards company or of a telephone company the right to use ordinary business judgment in the conduct of the affairs of the corporation." (p. 747)

After citing and considering many cases, the Court concluded:

> "These cases do no more than to apply the rule

> long settled that the power to regulate rates does not confer the power to manage." (p. 748)

If it was regulation in the *Tagg case* for the secretary to say that five thousand dollars a year was a reasonable salary for cattle salesmen when only four out of thirty-nine such salesmen were paid that much, it was not regulation, but management and dictation, for the Secretary to say that on the Chicago market a cattle salesman's salary should be $4,500 when such salesmen receive on the average $1,108.08 more than the salary considered reasonable by the Secretary.

The universally applied rule that an administrative body or officer can regulate, but cannot manage, applies to salaries as well as to other expenses. In *New York & Richmond Gas Co.* v. *Prendergast* (10 F. (2d) 167) it was contended on behalf of the defendant that the salary paid to the comptroller of the gas company was not justifiable. The Court said, page 181, that in the absence of evidence to the effect that the company did not conduct its affairs with proper discretion and sound business judgment, it would be assumed that the business was conducted as the ordinary prudent business-man would conduct his own affairs. In the present case no charge of bad faith, mismanagement, or the exercise of imprudence is made.

In *Havre de Grace Bridge Co.* v. *Towers* (103 Atl. 319) an Order of a Commission was reversed by the Maryland Court of Appeals for the reason, among others, that:

> "the Public Service Commission by its Order undertook by indirection to direct the financial management of the company." (p. 490)

The discussion as to management and operating expenses related to salaries of officers.

In *Banton* v. *Belt Line Ry. Corp.* (268 U. S. 413, 421) the Court said:

> "Broad as is its power to regulate, the state does

not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners."

Many more cases than those quoted from above are referred to on point five of Propositions of Law. Yet in view of this unanimous line of authorities, the secretary of agriculture states in paragraph 117 of his Findings (R. Vol. I, p. 138):

"the method here pursued is to determine a normal cost by the exercise of judgment upon all the facts of the record * * *"

The appellants have always understood that the word "normal" means average or ordinary or usual, but the secretary's definition of the word "normal" is what he thinks the costs should be regardless of whether the costs are or can be that amount. We propose now to show that the exercise of the secretary's judgment was arbitrary and unreasonable and that his judgment was exercised without the use or consideration of any well-known or well-recognized method of determining costs. Rather he sought to impose his personal fiat for that of the prudent business management of the appellants.

No brief is held out by the appellants for any particular experience method of determining what normal costs are; but the appellants do contend that well-known and widely used methods in economic studies would have brought entirely different results from those arrived at by the Secretary.

As we have observed, the Secretary purports to follow methods of fixing reasonable costs employed in the *Tagg case*. That is, the Secretary adopted a general classification of costs which is set forth in paragraph 158 of his Order (R. Vol. I, p. 180). This classification includes salesmanship, yarding salaries, yarding expenses, office

salaries, office expenses, business getting and maintaining, administrative and general expenses, insurance, and interest on necessary capital. In the District Court the brief of the Secretary stated:

> "The secretary analyzed the costs of each firm with respect to the different functions, and delegated those costs to the different species. Then, after the firms whose experience was abnormal had been identified by the exercise of judgment based on the study of all the data in the Record and their experience given appropriate consideration, the secretary determined a figure for each function around which the costs tended to cluster."

Unless the costs found by the Secretary bear a relationship to experience and actualities at the market, by whatever method determined, how could the Secretary possibly identify "the firms whose experience was abnormal"? And how can the Secretary and his counsel urge that the Secretary "determined a figure for each function around which the costs tended to cluster" when the experience at the market was completely ignored?

The Secretary stated in paragraph 117 of his Findings (R. Vol. I, p. 138) that his method was to determine a normal cost. The expression "a normal cost" can have no meaning short of some method of arriving statistically at experience and actualities. This the Secretary rejects. The Secretary had no right or occasion to mark down each and every item of cost and expense below actual experience. In paragraph 168 of the Secretary's Findings (R. Vol. I, p. 185), he said:

> "Upon the basis of the reasonable costs hereinbefore determined and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory."

The Secretary was compelled, as he admits in the language

quoted, to substitute himself as a dictator of costs, and to lower actual costs, before he could determine that the rates charged were unreasonable.

The Secretary states that the employment of statistical methods in arriving at costs are objectionable (Findings Par. 118, R. 138). The methods to which he refers are: first, the median, which is the unit cost for that firm above which there are as many firms with higher costs as there are below, with lower costs; second, the bulk line method, whereby a certain percentage of firms having extremely high costs would be eliminated from consideration; and third, the weighted average method which makes an average unit cost for the market, weighted by volume of business done. The Secretary's objection to either of these methods is that judgment must be exercised in the choice of the method employed. That statement is obviously true but after a choice has been made, the market experience is reflected in the calculations made. Under the Secretary's method it is all a matter of guess. And whatever method is adopted, the result will bear a relationship to an actual and not a hypothetical normal. For instance, if a bulk line method were adopted, it could easily be shown what percentage of the firms had attained any unit cost in question. Again, with a weighted average taken as a basis, the influence of all firms would be represented in the average. With all of the methods, namely, bulk line, weighted average and median, a standard of costs would be selected that a large proportion of the firms could attain.

The Secretary, however, insists upon "the exercise of judgment." When he does not even purport to have found costs bearing a relationship to normal experience, it is evident that "the exercise of judgment" results only in the Secretary's conclusion as to what he thinks costs ought to be and not what costs are. This is illustrated particularly in respect to the salary allowance for salesmanship.

In paragraph 134 of his Findings (R. Vol. I, p. 149), the Secretary says:

> "The salaries of the employed salesmen are the result of bargaining and afford a fair test of what salesmanship can be purchased for in the open market."

This recognition by the Secretary that the fair test of what salesmen can be purchased for is a result of bargaining in the open market, is entirely inconsistent with the Secretary's finding that $4500 is a reasonable price to be paid to a cattle salesman since $4500 is $1108 less than the average paid for such salesmen. If the fair test is the purchase price on the open market, as the Secretary states, a figure far below the average of the market does not comply with this fair test.

The fair test purchase price in the open market, was utilized in the *Tagg* case where the salary of cattle salesmen found to be reasonable was $5,000 and where only 4 of the 39 salesmen received that amount or more. What the Secretary says is a fair test at any market was not applied in the findings in respect to the Chicago market. The finding of $4500 is not what the market agencies must pay in the open market but what the Secretary thinks they should have to pay. The Secretary would regulate not only the owner but the wage earner as well.

The Secretary's findings in this respect bring his method precisely within the condemnation of this Court in *West Ohio Gas Company* v. *Public Utilities Commission of Ohio*, 294 U. S. 79, 82, in which the Court said:

> "There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances', is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience."

The experience is what the market agencies have to pay upon the open market for salesmen. If the Secretary has power to say what a market agency may agree to pay in bargaining with a salesman, in other words, to fix salaries without regard to experience, there will henceforth be no difficulty for the Secretary at any time to say that any set of rates is unreasonable by the mere expedient of saying that salaries which must be paid as a result of bargaining are "by the exercise of judgment" too high; and the answer in any rate investigation case can be determined in advance of a hearing.

The lack of relationship between the Secretary's reasonable cost and the market experience is shown by Petitioners (appellants) Exhibit 11 (R. Vol. I, p. 296). All of the facts and figures appearing upon this Exhibit were in evidence before the Secretary, except the reasonable costs per head found by the Secretary. In this exhibit for each species of livestock and for each manner of delivery, namely straight cars of single or plural ownership, mixed cars of single or plural ownership, and drive-ins, the Secretary's reasonable cost is compared with the market median, with the weighted average and with the $66\frac{2}{3}$ per cent bulk line. The figures are for the year 1932. The figures in the first column entitled "Secretary's Reasonable Cost per car" is the result of taking the average number of head per car for each class of business and multiplying it by the Secretary's reasonable cost per head. For instance, in the case of straight cars, single ownership, of cattle and calves, there was an average of 25.56 head per car. This, when multiplied by the Secretary's cost per head for cattle and calves, $.4297, produces a cost per car of $11.41 shown in the first column of Exhibit 11 under "Cattle and Calves" opposite "Straight Cars Single Ownership" (R. Vol. I, p. 250).

With respect to each other class of business under each of the three species such as straight cars plural ownership,

the rate was applied to the average number of head per car of that class of business. And so likewise with a mixed car, single ownership, mixed car plural ownership, and drive-ins (R. Vol. I, p. 251).

The remaining columns in Exhibit 11 are self-explanatory. They are the petitioners' median, weighted average and 66⅔ per cent bulk line cost per car. The two right-hand columns on the exhibit show respectively the number of firms below the Secretary's cost per car, and the aggregate number of cars handled by such firms.

Without reciting all of the figures in that exhibit, attention is called to the fact as illustrative that the Secretary's reasonable costs for the handling of a straight car, single ownership, cattle and calves is only half of the median cost, half of the bulk line cost and only a trifle more than half of the weighted average. Only 3 firms out of 95, during 1932, handled such a class of business at costs below the Secretary's; and these firms handled less than 3/10 of 1% of that class of business at the market.

To take an example from the handling of hogs: The Secretary's reasonable cost per straight car single ownership is $11.99; the median is $17.64; the weighted average is $17.57; the bulk line $18.91. And in this class of business 8 out of 95 firms were below the Secretary's cost. These firms handled 500 out of the 14,400 cars of that class.

The figures given as petitioners' unit costs on Exhibit 11 will be attacked by the Government on the ground that these costs include adjustments for salary appraisals to cover the situations where there was no profit nor salary shown on the books for an owner or where the amount shown was inadequate in the judgment of an appraisal committee of five members having intimate knowledge of the business of the market. This salary appraisal adjustment increased the petitioners' unit costs 11%. The inclusion of

this 11% over what the Government found to be actual unit costs would make no material difference in the result shown on Exhibit 11. Even with salary appraisal adjustment included, the Secretary's reasonable cost per car would be less for each species and for each mode of arrival than the median weighted average or bulk line costs. For instance, in the case of straight cars, single ownership, cattle and calves, the Secretary's reasonable cost per car of $11.41 would compare with a median cost of $20.33, a weighted average of $18.48 and a bulk line of $19.80. The actual unit costs found by the Government as a result of its audits are subject to a criticism similar to that, but in reverse, leveled at salary appraisal adjustments. The Government accountant, Bachman, testified:

> "Where no owners' compensation was shown on the books, we put in the amount of profit in lieu of salary or drawing account. Where no profit nor salary was shown for an owner, there was not included any compensation for that owner, although on the questionnaires the owners were shown as rendering service. As I stated before, we in no way attempt to set out what the fair compensation of an owner should be, and I appreciate fully that with respect to the owner's income, this study may be incomplete insofar as there may be individuals who have no salary or profit assigned to them as compensation for whatever service they may have rendered" (R. Vol. II, p. 648).

The lack of relationship between the Secretary's reasonable cost per car found by computing his reasonable cost per head by the average number of head in each mode of arrival, is shown in a comparison of the Secretary's reasonable cost per car with the actual cost per car found by the Government accountants. In the following table, figures in the first column are taken from Petitioners' Exhibit 11 (R. Vol. I, p. 296) and the figures in the second column are taken from Sheet 17 of Respondent's Exhibit 12, before the Secretary (here filed as a physical exhibit).

Class of Business	Secretary's "Reasonable" Cost per car.	Government's Actual Cost per car.
Cattle & Calves		
Straight cars—single ownership	11.41	15.23
" " —plural "	13.14	26.68
Mixed " —single "	17.64	24.44
" " —plural "	18.86	41.54
Drive-Ins	12.42	29.62
Hogs		
Straight cars—single ownership	11.99	14.43
" " —plural "	11.33	19.74
Mixed " —single "	12.42	17.85
" " —plural "	11.83	24.37
Drive-Ins	11.07	24.00
Sheep		
Straight cars—single ownership	11.15	13.55
" " —plural "	10.25	20.98
Mixed " —single "	9.25	23.68
" " —plural "	9.21	29.37
Drive-Ins	9.54	36.05

Petitioners' Exhibit 11 (R. Vol. I, p. 296) reveals other astounding facts. The entire record shows, and it has so far been conceded by Government counsel, that it costs more to handle drive-ins than other classes of business; that it costs more to handle mixed cars than straight cars; that it costs more to handle plural ownership consignments than single ownership consignments. The Secretary's actual cost reduced to a carlot basis in the foregoing table, shows the same conclusion. However, the Secretary's reasonable costs indicate reverse situations. His reasonable cost for handling drive-in cattle and calves is $12.42 as compared with $18.86 for mixed cars plural ownership. His reasonable costs for handling drive-in hogs is $11.07 as compared with $11.99 for straight car single ownership. His reasonable cost for handling mixed cars plural ownership of hogs is $11.82 as compared with $12.42 for mixed cars single ownership. Similar observations are shown on Exhibit 11 and in the table above in respect to sheep.

One fact which shows, perhaps more clearly and concisely than any other, that the Secretary's reasonable costs have no relationship to the normal market experience is that

while the Government's cost figures show that expense of handling livestock increases with mixed arrivals of livestock with a plurality of owners in a shipment and with drive-ins, *yet the Secretary in finding per head reasonable costs, finds the same amount as reasonable per unit cost regardless of the number of head in a shipment, the mode of arrival, or the number of owners.*

When more expensive modes of arrival predominate, the costs are accordingly increased and over this factor the market agencies have no control. Where a consignment can be sold as a single unit it is cheaper to handle than when it must be sorted and sold in multiple units. The necessity for the breaking up of consignments is beyond the control of the commission men and increases their costs in spite of the utmost efficiency. Therefore, it will be realized that when unit costs have been reduced to their ultimate refinement, they do not of themselves indicate whether efficiency or inefficiency exists.

The appellants are entitled to some information as to the method employed by the Secretary in arriving at his so-called reasonable costs other than by the statement that it was by "the exercise of judgment". Neither the Secretary in his findings, nor Government's counsel, have up to this time accepted the challenge to state what items of cost and what expenditures are considered abnormal and unreasonable, and by what method such items were selected as being unreasonable. The only way that reasonable costs which deviate so far from experience and from the normal can be justified, is by a showing that there is included in such costs wasteful or extravagant or unnecessary expenditure. The only answer is "the exercise of judgment".

In the foregoing discussion of the absence of a relationship of costs allowed as reasonable to the normal market experience, reference has been made particularly to the salaries of cattle salesmen. The same lack of relationship ob-

Class of Business	Secretary's "Reasonable" Cost per car.	Government's Actual Cost per car.
Cattle & Calves		
Straight cars—single ownership	11.41	15.23
" " —plural "	13.14	26.68
Mixed " —single "	17.64	24.44
" " —plural "	18.86	41.54
Drive-Ins	12.42	29.62
Hogs		
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In the foregoing discussion of the absence of a relationship of costs allowed as reasonable to the normal market experience, reference has been made particularly to the salaries of cattle salesmen. The same lack of relationship ob-

tains also in respect to hog and sheep salesmen. The Secretary would allow to a hog salesman who sold three times as many hogs as the market average, a salary of $3600 or $588.93 less than the amount actually paid, namely, $4,183.93. In the case of sheep, the salary deemed reasonable by the Secretary is $4,000 per year, while the average salary paid was $4,451.13.*

In the Omaha case $5,000 was allowed for sheep salesmen employees. Of the nine at the Omaha market only 3 received salaries of $5,000 or more, and 4 received less than $4,000 a year. In the Omaha case $4,000 was allowed for hog salesmen. Of the 25 employee hog salesmen only 5 received salaries of more than $4,000; and 15 received less than $3,000 per year. (Gov't brief, *Tagg case*, p. 31.)

These salary allowances were characterized by counsel for Secretary in the *Tagg case* to

> "represent approximately the maximum market value of salesmanship." (Brief, p. 31.)

Yarding and office expense allowed by the Secretary, while below costs actually incurred, bears a relationship to actual cost. The departure from experience and evidence by the Secretary in respect to salary of salesmen was arbitrary and unreasonable.

The District Court in the Omaha order in the *Tagg* case, 29 F. (2) 755, said:

> "The Secretary found a maximum for the other items of costs of carrying on the market agencies in substantially the same way that he arrived at the salesman cost."

In the Omaha case, the allowance for a cattle salesman was $5,000, only 4 salesmen out of 39 on that market re-

* The figures in this paragraph are for the year 1932 and are taken from Respondents' Exhibit 12 before the Secretary, the Secretary's Order of January 8, 1934 (R. Vol. I, p. 62) and from Petitioners' (Appellants') Exhibit 9 (R. Vol. I, p. 291-294).

ceiving that amount or more. The District Court in the *Tagg* case said that for other items of cost, the Secretary found a maximum in substantially the same way. This the Secretary did not do in the Chicago or instant case. As to every item of cost in the Secretary's analysis of costs, *except the salary of salesmen*, the Secretary in his findings listed from highest to lowest the amount of actual costs of the firms. Why salary costs for salesmen were treated in a different fashion does not appear. An inspection of the amounts allowed per head for yarding salaries, yarding expense, office salaries, etc., will show that the per head amounts deemed reasonable by the Secretary for these cost factors does bear a relationship to experience. In making this statement the appellants do not admit that the per head allowances for yarding salaries, yarding expenses, office salaries and the like are adequate. The point is that for every item of expense except salesmen's salaries, the Secretary endeavored to find a figure bearing some relationship to the normal. The burden is upon the Secretary to show why a different method was followed in respect to the salary of salesmen.

To amplify the method followed by the Secretary in respect, for instance, to yarding salaries, yarding expenses and office salaries, we discuss briefly those factors of expense and the amount allowed as reasonable by the Secretary. In respect to yarding salaries, the amount found reasonable per head as to cattle and calves is $.0725 (R. Vol. I, p. 153). On pages 150 and 151 of the record the yarding salaries per head for cattle and calves paid by each firm are listed from the lowest to the highest. There are 32 firms below the allowance of $.0725 and 68 firms above that amount; while the median is $.0798, or $.0073 more than the amount deemed reasonable.

Yarding salaries per head of hogs show a similar situation. Reference to pages 151 and 152 of the record (Vol. I) show that there are 35 firms whose costs were below the al-

lowance of $.0280; and 64 firms above. The median is $.0035 more than the allowance, or $.0315.

Per head yarding salaries for sheep tell a similar story. There are 29 firms below the Secretary's allowance of $.0085 per head, and 64 firms above. The median is $.0110, or $.0025, above the allowed amount (R. Vol. I, pp. 152-3).

Turning now to yarding expenses other than salary, the Secretary allowed as a per head cost for cattle and calves $.0075. 27 firms are below this amount and 28 above. The allowance is for all practical purposes the median. In the case of hogs, 16 firms are below the Secretary's allowance of $.0004 per head, and 16 firms above. The amount deemed reasonable is the median. Yarding expenses other than salary for sheep salesmen tell a similar story with 7 firms below the amount allowed as reasonable by the Secretary, and 9 firms above. (All figures discussed in this paragraph are found in Volume I, pp. 153-4.)

A sentence or two in respect to office salaries. The per head reasonable amount for cattle and calves is $.0750. 36 firms are below this amount and 65 above. The median is $.0839. The difference between the allowed figure and the median figure is $.0089. In respect to office salaries per head of hogs, the Secretary's allowance is $.0250. 35 firms are below this amount and 64 above. The median is $.0027 more than the amount deemed reasonable. A similar situation prevails in respect to the office salary allowances per head for sheep. (All references in this paragraph are to Vol. I, pp. 154-7).

From the above paragraphs the Secretary's own findings themselves show that one method was followed in the determination of an allowance for salaries of salesmen and a different method followed in respect to the alleged reasonable allowances for other factors of cost in conducting the livestock commission business. It is apparent, likewise, that

the Secretary departed from the teachings of the *Tagg* case upon which he relies, for in that case the same method was followed in arriving at salesman cost as was employed in finding a maximum for the other items of cost. The departure from experience and evidence by the Secretary in respect to the cost of salesmen was arbitrary and unreasonable.

The theories of the Secretary as to performance of salesmen and salary allowance cannot meet the test of economists of measurement by actualities.

The cost studies used in the hearings before the Secretary were examined by Doctor Harry H. O'Neill, head of the Department of Economics at St. Louis University (R. Vol. II, p. 1116). His studies included the preparation of respondents (appellants) Exhibit 22 (Physical Exhibit), which is a correlation study, the purpose of which was to determine what degree of association existed between volume of business and costs of doing business.

He stated (p. 1120):

> "The study indicates little or no degree of association between the figures for volume and costs as supplied to me. It is the method that is most generally used. In fact, it is in very general use. Where I have referred to costs, I have reference to unit costs. We have included all firms on the market and the number of items are sufficiently numerous to give accurate results. This case is not a question of sampling at all. We have used all the firms on the market."

Dr. O'Neill also prepared respondents' or appellants' Exhibit 23, a physical exhibit showing a bulk line, median and weighted average analysis of the cost of selling. All volumes of all firms were considered separately and in the aggregate. The Secretary found the reasonable per head cost for cattle and calves to be $.4297. Dr. O'Neill testified (R. Vol. II, pp. 1120 and 1121) that it cost $16.92 per car to

handle the cheapest 10 per cent of straight car single ownership cattle and calves, or 58c per head and that 50 per cent of the lowest cost volume indicated a bulk line cost of $19.92 or 68c per head. Dr. O'Neill's testimony as to costs applicable to other modes of arrival and other species demonstrates the same result, namely, that the Secretary's reasonable per head costs bear no relationship to the normal actual experiece of the market.

The viewpoint of the economist is expressed by Dr. O'Neill in these words:

> "In any piece of scientific work, we always subject our hypothesis, or theory, to the test of what has actually happened, or what has actually been accomplished; and so necessarily any standard that deviates by a wide margin from what has actually occurred must be wrong." (R. Vol. I, p. 1132.)

Measured by such a test, the Secretary's allowances for reasonable cost fail.

The method by which reasonable costs are ascertained in the rate hearings are unimportant in and of themselves; and the appellants hold no brief for any particular method. The point is that some method should have been used either to determine reasonable costs or to test such a determination with actualities.

III.

THE DENIALS OF THE PETITIONS FOR REHEARING WERE ARBITRARY.

The Secretary's Order was issued January 28, 1934 (R. Vol. I, p. 62). Before its effective date and on February 7, 1934, a petition for rehearing was filed. This petition alleged, among other things, that the schedule of rates and charges prescribed in the Secretary's Order would cause reductions in revenue which would make it impossible for the appellants to pay necessary operating expenses; that

there had been increases in expenses resulting from the operation of the National Recovery Act and Agricultural Adjustment Act; that during 1933, substantially all of the appellants operated at a loss; that direct sales of livestock to packers were increasing; that the rates prescribed by the Secretary would necessitate throwing out of employment a large number of people; and that the conditions which prevailed during 1933 constituted a greater change than had occurred during any twelve months period prior thereto (R. Vol. I, p. 190).

This petition for rehearing was denied on March 12, 1934 (R. Vol. I, p. 189-191). Before the effective date of the Order of March 12, 1934 and on April 9th, the appellants filed a second or amended petition for rehearing (R. Vol. I, p. 10). This petition for rehearing was denied April 12, 1934.

A second petition for rehearing alleged that the rates and charges prescribed by the Secretary would create a net reduction of 25 per cent in gross income; that the rates prescribed were confiscatory and would not produce income sufficient to pay necessary and usual costs of doing business; that the rates prescribed were based on findings for the years 1931 and 1932 while during the years 1933 and 1934 decided and profound economic changes had occurred adversely affecting the market agencies at Chicago; and that legislation of Congress and the activities of administrative agents of the Government had brought about drastic reduction in the production and marketing of livestock, particularly hogs (R. Vol. I, p. 10).

The denials of the petition for rehearing were arbitrary. The appellants were precluded from showing that the prescribed rates would be confiscatory and prevented from showing, so far as it was then possible to show, that there would be drastic reduction in the production and marketing of livestock, a fact which is now of universal knowledge.

The Secretary refused the hearings and now contends, as we shall hereafter show, that the appellants were not entitled to make such showing before the Court.

On the issue of confiscation, there is devoted a separate section of this Brief. It is here argued that the Secretary should have allowed the petitions for rehearing because of the representations made in respect to changing economic conditions and reductions in the production and marketing of livestock.

Tagg Bros. and Moorhead v. *United States,* 280 U. S. 420, 444, was the authority of the appellants in applying for a rehearing. The opinion in that case states:

> "Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change".

In *Atchison, Topeka & Santa Fe* v. *United States,* 284 U. S. 248, the court held it was reversible error to deny a petition for rehearing alleging economic changes since the closing of the record, which changes had a substantial effect on revenue under the rate order.

The evidence which the appellants sought to offer was not evidence which the appellants could have offered on the original hearing. Before the Order of the Secretary was entered, the appellants had no means of knowing whether or not the rates prescribed would be confiscatory. They might have been entirely satisfactory. It would have been entirely impossible to show what effect newly prescribed rates would have until after January 8, 1934, when the rates first became known. In respect to the reduction in livestock marketed, that factor was just beginning to make its influence felt. The *Tagg* case says that the Secretary not only has the power, but the duty to modify the order if

new evidence warrants the charge. The Secretary could not take the first step in the performance of this duty without a consideration of the new evidence. This he refused to hear. That the appellants were correct in the allegations for the petitions for rehearing that drastic reductions in the marketing of livestock, particularly hogs, would occur, and in the allegations that direct sales to packers were increasing, and in the allegation of increased expenses, is now of universal knowledge. We refer to the publications of the Department of Agriculture.

By January 15, 1934, one week after the entry of the Secretary's Order, 6,410,866 pigs, sows and inedible little pigs had been killed as a result of the emergency hog marketing program. (Senate Document 140, 73rd Congress, Second Session, Emergency Hog Marketing Program, a letter from the Secretary of Agriculture, p. 40, Petitioners' Exhibit No. 12 before the Court). The same reference, page 42, states:

> "the sale of each sow * * * removed from fall farrowings approximately five pigs which, under normal circumstances, are fed to an average market weight of about 225 pounds".

It is further stated that the reduction up to January 15, 1934, as a result of the program was in the neighborhood of 1,000,000,000 to 1,200,000,000 pounds.

Miscellaneous Publication No. 235 of the United States Department of Agriculture, November, 1935, entitled "The Agricultural Outlook for 1936" shows the justification of the appellants' fears as expressed in the petitions for rehearing of reductions in the supply of and the marketing of livestock.

> "The supply of meat animals on farms in terms of the total live weight of the three species at the beginning of 1936 probably will not be greatly different from a year earlier, *when the aggregate supply was estimated to be the smallest in more than 30 years.* With

none of these species is there any present certainty as to whether numbers on January 1, 1936, will be larger or smaller than a year earlier, and with none of them is the change, either upward or downward, expected to be large. It seems probable, however, that a considerable increase in the number of hogs on farms will occur during 1936 and some increase in cattle numbers next year is also probable.

"From 1928 to the beginning of 1934 the trend in the number of meat animals was upward. The increase during this period in terms of total live weight was about 12 per cent. Most of this increase was eliminated in 1934, largely as a result of the severe drought. The number of cattle on farms increased steadily from 1928 to early 1934 with the increase in numbers from January 1, 1928, to January 1, 1934, amounting to 11,600,000 head, or 20 per cent. By the beginning of 1935, however, cattle numbers were about 7,600,000 smaller than at the beginning of 1934. Thus, more than three-fifths of the increase occurring in the 5 years 1928-34 was eliminated by the beginning of 1935. Hog production (number of pigs raised) decreased from 1928 to 1930 and increased sharply in 1931 with little change in 1932 or 1933. Partly as a result of the 1934 drought and the resulting shortage of feed grains and partly as a result of the low corn-hog price ratio prevailing from the middle of 1933 to early 1934, the number of pigs produced in 1934 was 35 per cent smaller than in 1933 and was the smallest number produced in many years. The number of hogs on farms at the beginning of 1935 was the smallest in 50 years. Sheep numbers increased steadily from 1923 to 1932, the increase amounting to about 17,000,000 head, or 45 per cent. From 1932 to 1934, sheep numbers declined slightly but the number on January 1, 1935, was about 5 per cent smaller than a year earlier and was the smallest since 1929." (p. 53 and 54.)

This quotation contains the illuminating facts that the supply of meat animals on farms at the beginning of 1936 was the smallest in more than thirty years; that at the beginning of 1935 cattle numbers were 7,600,000 smaller than at the beginning of 1934; that hog production in 1933 and

1934 was the smallest in many years; that the number of hogs on farms at the beginning of 1935 was the smallest in fifty years; that sheep numbers on January 1, 1935, was the smallest since 1929; that these reductions were the result of the drought and the resulting shortage of feed and the result of the corn hog program. The publication continues with the following statement:

> "The net results of these different factors influencing livestock production probably will be to perpetuate a situation caused temporarily by the 1934 drought; that is, to decrease somewhat the proportion of livestock production from the area covering the Great Plains and westward and to increase the proportion in the area east of the Mississippi River and including the East North Central, East South Central, and South Atlantic States." (p. 54-55.)

Further, in respect to hogs, the following excerpt is quoted from the same reference, U. S. Department of Agriculture Miscellaneous Publication No. 235:

> "Although federally inspected slaughter of hogs during the 1934-35 marketing year, totaling 30,678,000 head, was the smallest in 25 years, it is expected that slaughter in the 1935-36 marketing year will be even smaller. The 1935 spring pig crop was estimated by the Department of Agriculture at 30,402,000 head for the United States. This is a decrease of 7,405,000 head, or 19.6 per cent, from the spring pig crop of 1934 and a decrease of 20,814,000, or 40 per cent, from the average of the spring crops of 1932 and 1933. In the North Central (Corn Belt) States the spring crop this year was 22.3 per cent smaller than that of 1934 and 42 per cent below the 1932-33 average.
>
> The number of sows to farrow in the fall season of 1935 was estimated in the June pig crop report at 3,175,000 head. This is an increase of 19.5 per cent over the very small number farrowed in the fall of 1934, but is 34 per cent smaller than the average of 1932 and 1933. The total number of litters, spring and fall, to be farrowed in 1935 was indicated in the June pig crop report to be about 8,196,000. This is a reduction of more than 10 per cent from the total of 1934

and of 41 per cent from the average of 1932 and 1933. For the Corn Belt States the reduction in total litters in 1935 is 12 per cent from 1934 and 44 per cent from the average of 1932 and 1933. If the average number of pigs saved per litter in the fall of 1935 is as much above the fall of 1934 as the spring of 1935 was over the spring of 1934, the total number of pigs saved in 1935 will be less than 50,000,000 head. This would be about 4,000,000 head less than the total number of pigs saved in 1934 and more than 31,000,000 head less than the average of 1932 and 1933. Inspected slaughter in the marketing year 1935-36 from such a production probably will total between 27,000,000 and 28,500,000 head, and be the smallest since the year 1909-10." (p. 56.)

The foregoing quotation shows the effect upon domestic supplies of the slaughter of sows by the reduction in normal pig crop. The year 1934-35 saw the smallest slaughter of hogs in twenty-five years, and the judgment of the Department of Agriculture is that for the marketing year 1935-1936, the number of hogs sold for slaughter will be even smaller.

Commenting upon the production outlook for hogs, the same reference, Miscellaneous Publication No. 235 makes the following statement:

"The end of the downward trend in hog production, which began in the fall season of 1933 apparently was reached with the small spring-pig crop of 1935, and increasing production can be expected during 1936 and 1937. How rapidly hog production will increase during the next 2 years is uncertain, since there are no other periods in which the decrease in production was so great as it was in 1934 and 1935. The nearest comparable situations to the present were those from 1908 to 1912 and from 1891 to 1896. Inspected slaughter for the marketing years 1909-10 (pig crops of 1909) decreased 7,500,000 head, or about 21 per cent, from the previous year. Hog prices in 1910 advanced sharply and the 1910 pig crop, especially the fall crop, increased markedly. Inspected slaughter for the 1910-11 marketing year increased about 4,000,000 head and in the 1911-12 year was back about to the 1908-09 level.

Between the marketing years 1891-92 and 1892-93 the estimated inspected slaughter equivalent decreased about 6,500,000 head, or 27 per cent, and it was not until the marketing year 1895-96 that it again reached the 1891-92 level. During that period, the 1894 drought occurred—probably the most severe ever known in this country with the exception of the one in 1934—and this doubtless tended to keep production from increasing more rapidly. In that period the drought occurred in the second year after production had been greatly reduced, whereas in the present period it occurred in the same year. The decrease in federally inspected slaughter for the 1934-35 year from 1933-34 amounted to 13,200,000 head, or 30 per cent. If allowance were made for the pigs bought by the Government and slaughtered in August 1933 from the 1933 pig crop, the decrease was about 39 per cent. Slaughter in the marketing year 1935-36 is expected to be about 5 to 10 per cent smaller than that in 1934-35. No such reduction, either in numbers or in percentages as has taken place in the last 2 years, has ever before occurred and how rapidly a recovery can be made is very uncertain." (p. 59.)

It is to be observed that because no such reduction, either in numbers or in percentages, as has taken place, has ever before occurred, the Department is unable to predict how rapidly a recovery can be made.

Turning to cattle, we quote from p. 60 of Miscellaneous Publication 235:

"The number of cattle on farms January 1, 1935, was 60,557,000 head, according to the estimate of the United States Department of Agriculture. This was 7,623,000 head, or 11.2 per cent, less than the number January 1, 1934, but was about 3,000,000 head more than on January 1, 1928, the last low point of the cattle-number cycle. Compared with 1928, however, all of the increase was in the number of cattle kept principally for milk (cows, heifers, and heifer calves) and there was a small decrease in the number of other cattle, mostly cattle kept principally for beef. Compared with January 1, 1934, there were reductions of 2,221,000 head,

or 6 per cent in milk stock and 5,402,000 head, or 17 per cent in other cattle.

The decrease in cattle numbers during 1934 was larger than during any year of record. It was largely a result of the severe drought which extended over most of the country west of the Mississippi River and of the purchase and slaughter of cattle and calves as a part of the drought-relief activities of the Federal Government. Had there been no drought, it is probable that some decrease in cattle numbers would have occurred in 1934, but if feed production had been fairly normal the reduction would have been relatively small. With no abnormal conditions, such as wide-spread feed shortage or production-control plans, cattle numbers would have declined for some years and another low point in numbers would have been reached in about 1939 or 1940. Most of the decrease that would have normally extended over the following 5 or 6 years therefore occurred in 1934." (p. 61.)

This quotation shows that the supply of cattle goes in cycles; that the last low point of cattle number was January 21, 1928; that another low point might have been expected about 1940 but that the decrease which would normally have extended over the period from 1936 to 1940 occurred in a single year, 1934.

On page 62 of the same Bulletin is found this most significant statement:

"Cattle marketings from all the West North Central States, except Kansas, during the first half of the year were sharply below those of the first half of 1934 and the marketings from most of the Western States were relatively small, except from California. * * * Receipts of beef steers at Chicago during the first 9 months of 1935 were much the smallest for those months in the 14 years of record, being nearly 30 per cent smaller than in 1934 and 34 per cent smaller than the average of the preceding 5 years. The number of cattle on feed in the Corn Belt States on August 1 was estimated as about 30 per cent smaller than a year earlier and the smallest for that date in many years." (p. 62.)

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It is predicted, p. 65 of Publication 235, that two or three years will be required after 1935, in States West of the Mississippi River (the Chicago Market area) to build up the reduction that occurred in 1934 in cattle.

In respect to sheep and lambs, we quote from pages 66 and 67 of Publication 235.

"According to the estimate of the Department of Agriculture, *the 1935 lamb crop of 27,630,000 head was the smallest since 1929.* It was 7 per cent, or 2,030,000 head, smaller than the 1934 crop and 4,600,000 head smaller than the record crop of 1931. The decrease from 1934 was all in the western sheep States since the native-lamb crop of 1935 was somewhat larger than that of 1934. Although the number of breeding ewes on January 1, 1935, in the native-sheep States was 2 per cent smaller than a year earlier, the number of lambs saved per 100 ewes (the percentage lamb crop) in 1935 was enough larger than in 1934 to more than offset this decrease in ewes. The native-lamb crop of 1935 was practically the same as the average native-lamb crop for the 5 years 1930 to 1934.

The 1935 lamb crop in the western sheep States was the smallest since 1927, being 11 per cent, or 2,079,000 head smaller than the 1934 crop. The number of breeding ewes January 1, 1935, was 7 per cent smaller than a year earlier and the percentage lamb crop was the smallest in the 14 years for which records are available, being 70.3 compared with 73.8 in 1934 and 78.2 the average from 1925 to 1934. The crop of 1935 was smaller than that of 1934 in all of the Western States, except California and New Mexico. The decreases from last year were relatively the largest in the late-lambing States and all of the decrease from last year was in late lambs, as the early-lamb crop (which covers lambs dropped before Mar. 15) was but little different from last year.

The small western lamb crop this year was a result of the 1934 drought. The reduction in breeding ewes was related directly to the drought through the relief activities of the Federal Government under which some 3,450,000 ewes were bought in the Western States in the late months of 1934. Because of the very bad range conditions during the summer and fall of 1934, ewes in

nearly all of the western sheep States were in poor condition at breeding time and the number of dry ewes this spring was relatively large. Death losses of ewes, although rather heavy in some States, were only about average for the western area as a whole. The favorable weather during most of the winter and early spring tended to offset the shortage of feed and the poor condition of ewes at the beginning of the winter. Weather conditions during lambing were about average, but there were above-average losses of lambs in some States as a result of the cold, wet weather in May and early June and because of the lateness of new grass.

Although the lamb crop of 1935 was materially smaller than that of 1934, the slaughter of 1935 lambs during the first 5 months of the 1935-36 marketing year (May 1, 1935, to Apr. 30, 1936) was considerably larger than during the first 5 months of the 1934-35 year. Inspected slaughter during the 5 months of this year of 7,765,000 head was 962,000 head, or 12½ per cent larger than in 1934 and the largest for the 5 months on record. This heavy slaughter during the first half of the marketing year, in view of the smaller lamb crop, indicates a reduction in the slaughter supply during the remainder of the year relatively much greater than the reduction in the size of the lamb crop." (pp. 66-67)

With reductions in supplies in hogs, cattle and sheep, all of them the lowest for many years, the allegations in the appellants' petitions for rehearing have proved themselves. The appellants were not in a position to prove when the petitions for rehearing were filed, all of the facts and figures given above. No one knew them; but as to every factor except the unexpected and unprecedented drought, the appellants could have proved the tendencies which were then in operation.

In the petitions for rehearing, the appellants alleged increased expenses. One of them was the accelerating increase in drive-ins, the most expensive form of business to handle. A publication of the United States Department of Agriculture entitled "Drive-In Receipts of Livestock 1935" shows that in respect to cattle, the drive-ins in 1932,

the year about which the testimony in the record was taken, were 14.87 per cent of receipts at the Chicago market; in 1933, 22.46 per cent; in 1934, 24.47 per cent; and in 1935, 35.27 per cent. For calves, drive-in, that is, arriving by truck rather than in carload lots, the percentage at the Chicago market of total receipts has risen from 19.94 per cent in 1932 to almost double that amount or 37.84 per cent in 1935. For hogs received on the Chicago market, drive-ins have increased in the following percentages:

1932.....16.81%
1933.....25.08%
1934.....30.52% and in
1935.....34.80%

As to sheep and lambs,—the drive-in percentage has increased at Chicago from 6.85 per cent in 1932 to 16.37 per cent in 1935.

Again the appellants knew whereof they spoke in their petitions for rehearing. In the meantime the situation of the livestock producers and shippers has improved. The February 1, 1936, issue of "Agricultural Situation" published by the United States Department of Agriculture monthly shows (p. 21) that the index number of prices received for meat animals has risen from 92 in 1931 to 118 in 1935.

The appellants do not contend that the validity or reasonableness of the Secretary's Order is to be determined by facts occurring subsequently to the entry of the Order. The appellants' position is that if the Secretary had not denied the petitions for rehearing, he could have been shown by evidence that economic conditions had changed adversely to the commission firms and that supplies of live stock were on the decrease subsequent to the year 1933 when the original hearing was had. Under the *Tagg* case it was the Secretary's duty to have permitted the appel-

lants to at least have made this attempt. Subsequent events have proved that the appellants were right. The Secretary's denial of the petitions for rehearing was arbitrary and unreasonable.

One is not compelled to come to court on the issue of confiscation with the facts already found against him.

Confiscation involves a consideration of the law and the facts. The appellants pleaded for the right, by the only possible method, a petition for rehearing, to demonstrate to the Secretary the effect of his Orders. The changed economic conditions and the effect of legislation upon the supplies of livestock were pertinent considerations as to the reasonableness of the prescribed rates. By the denials of the petitions for rehearing, the Secretary prejudged the case. If the rate order was to apply retroactively, the changing conditions and supplies urged by the appellants would not have been relevant. But a rate order looks to the future. The Secretary should have listened to the pleas of the appellants that the rates prescribed by him would be confiscatory because of the increased expenses and the decreases in volume, factors which were not known at the time of the hearing before the Secretary, and consequently were not in the record before him, but which were in existence at the time the rates were prescribed. The rates prescribed were to operate in the future and should have been made applicable to changed conditions, increased expenses and low volume. Instead the Secretary compelled the appellants to come to court with the facts already found against them, contrary to the admonition of the Court in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 218.

IV.

THE SECRETARY USED A SINGLE YEAR, 1932, AS A TEST PERIOD. THIS WAS INADEQUATE WHETHER HIS FINDINGS AS TO THAT YEAR WERE RIGHT OR WRONG.

At the hearing before the Secretary there was introduced in evidence audits of the business done by each of the appellants for the years 1931 and 1932. The audits were for the purpose of determination of costs (Secretary's Findings, Par. 108, R. Vol. I, p. 131). However, the functional unit cost allowed by the Secretary in his Order was derived from an analysis of the business of each of the appellants for the year 1932 only (Secretary Findings, Par. 110, R. Vol. I, p. 133).

In the same paragraph, the Secretary states that he used the year 1932 rather than the year 1931, or both years, because the year 1932 was the one next preceding the year in which the hearing was held; because a full calendar year gives due weight to the seasonal changes which take place in the marketing of livestock and because rates adequate to produce reasonable costs and reasonable profits in a low volume year should not prove to be too low in those years in which an increase in volume occurs. Referring first to the statement that a full calendar year gives due weight to seasonal changes which take place in the marketing of live stock, that statement may be accurate if full consideration is given to the word "seasonal." But there are other variations of longer time duration which occur. The Secretary did not foresee in making this statement that there was no other period in the history of the stockyards in which the decrease in production of hogs was so great as it was in 1934-35. U. S. Department of Agriculture, Misc. Publication No. 235 entitled "The Agricultural Outlook for 1936," published November, 1935, p. 56. Nor did

he foresee that during 1934-35, the slaughter of hogs was the smallest in twenty-five years, but is expected in 1936 to be even smaller (same reference). Nor did the Secretary foresee that the decrease in cattle during 1934 was larger than during any year of record; nor that the receipts of beef steers at Chicago during the first nine months of 1935 was much the smallest for those months in fourteen years of record, being nearly 30% smaller than in 1934 and 34% smaller than the average of the preceding five years (Same reference, pp. 61-62).

In making the statements in Paragraph 110 of his findings that the 1932 receipts were lower than for 1931 and if a set of rates for a low volume year were adequate, they would *a fortiori* be adequate for a high volume year, the Secretary did not have before him the facts which are now public, namely, that no other period exists in which decrease in production was so great as in 1934 and in 1935, with 1936 figured to be even less. The motive of the Secretary in taking 1932 as a test year because of its low volume is appreciated. He took a low volume year to determine costs in order that for a high volume year the rates prescribed by him would be adequate. The appellants contend that the rates prescribed were not adequate for the year 1932 and that it follows from the Secretary's own statement that rates intended by him to be adequate for the low volume 1932 year must certainly be inadequate for the years subsequent in which the volume has been even less.

By petitions for rehearing, the appellants made offers to prove that volume would decrease. These petitions were denied although the Secretary then knew of the programs of the Agricultural Adjustment Administration, including corn hog reduction. No one foresaw that the decrease in cattle numbers during 1934 would be larger than during any year of record

"largely a result of the severe drought which extended

over most of the country west of the Mississippi and of the purchase and slaughter of cattle and calves as a part of the drought-relief activities of the Federal Government." (U. S. Department of Agriculture, Miscellaneous Publication No. 235, p. 61).

In *Denver Union Stock Yard Co.* v. *United States* 57 F. (2) 735, the Secretary was criticized in reference to a determination of rates for the future upon an experience of a single year of the past. The court remarked that in estimating earnings for the future, the business world generally considers the earnings for at least a five year period in the past. This rule has received the approval of the Supreme Court in *Knoxville Water Case* 212 U. S. 1. The Court in the Denver case also said that the test period for rates should exclude abnormal years; and the court took judicial notice of a marked depression in business.

In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 294 U. S. 79, the commission in fixing rates used the year 1929 as a standard. Besides the figures for 1929, there was evidence, full and unchallenged, as to the revenue and outlay for 1930 and 1931. The Commission refused to give any heed to that evidence in fixing the new rates. This it did in the face of a petition for rehearing. The court said (p. 81):

> "We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and 'of the rudiments of fair play' made necessary thereby."

Changed economic conditions and decrease of volume of livestock handled emphasize the necessity of an adequate test period.

In Paragraphs 100 and 101 of the Secretary's findings (R. Vol. I, pp. 126-127), the Secretary states that the proceeding was instituted during a period of severe economic depression and that both livestock producers and commis-

sion firms have felt the effect of disturbed economic conditions; that there has been an increase in items of expense; that practically all the firms had made substantial reductions in salaries of employees and owners; and that some curtailment had been made in business getting and maintenance; and that the chief factor affecting the business conducted by the appellants was a decrease in the volume of business consigned to the Chicago market for sale.

The prophecy of higher volume expressed in Paragraph 110 of the Findings (R. Vol. I, p. 133) did not materialize. Instead the volume decreased unprecedentedly. Shortly after the Secretary's Order of January 8, 1934 and on February 7, 1934, the appellants filed a petition for rehearing in which it was alleged, among other things, that the conditions which prevailed during 1933 constituted a greater change than had occurred during any twelve months period prior thereto and that during 1933, even on the old 1923 rates, substantially all of the appellants operated at a loss. This rehearing and offer of proof was denied. A second petition for rehearing was filed on April 9, 1934, again setting forth

> "the decided and profound economic changes . . . adversely affecting the market agencies at Chicago,"

during the years 1933 and 1934. This petition for rehearing was denied within three days.

The arbitrary action of the Secretary in denying the petitions for rehearing brings this case precisely within the ruling of this Court in the *West Ohio Gas Case*, 294 U. S. 79, *supra*. The only difference is that in the *West Ohio Gas* case there was already evidence in the court which the Commission had ignored, while in the instant case, the appellants offered to produce evidence which could not possibly have been procured during the time of the hearing

before the Secretary. In the *West Ohio Gas* case, the Court said at pp. 81-82:

> "The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from reckoning is as much arbitrary action as to build a schedule upon guess work with evidence available. There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all of the relevant circumstances' is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' * * * We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.' We say the same of a like attempt by officers of Government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

In no case is the test of a single year adequate. Business uses five years. Those who have the power to regulate rates for the future should use a similar test.

In the instant case, even though the Secretary may be excused for having confined his cost studies to 1932, he was entirely arbitrary, unreasonable and unfair in refusing the petitions for rehearing and the offers of proof made therein. He could not prescribe rates on prophecy when the whole world, himself included, knew that the experience was otherwise.

V.

THE RATES PRESCRIBED BY THE SECRETARY ARE CONFISCATORY OF THE BUSINESS, PROPERTY AND SERVICES OF EACH APPELLANT AND VIOLATIVE OF THE FIFTH AMENDMENT OF THE CONSTITUTION.

At the hearing before the District Court, the appellants offered evidence to prove, among other things, confiscation. The Secretary objected to the introduction of any additional evidence, taking the position that even though the petitions for rehearing which alleged confiscation had been denied and the appellants refused a hearing to show the application of the rates prescribed to their business, nevertheless such evidence could not be adduced before the Court. The question of the admissibility of this evidence is argued in the following co-ordinate section of this Brief. The District Court admitted the evidence, subject to the objections made by the Secretary's counsel.

In general, the evidence offered before the Court was the testimony of Earle D. Mudd, a consulting accountant and statistician of many years experience both in the live stock commission field and in others. He supported his testimony by exhibits of figures and graphs to show the effect of the rates prescribed by the Secretary upon the 1932, 1933 and the 1934, up to April 30, business of each of the petitioners. Mr. Mudd's testimony is found in the record (Vol. I. pp. 212-256); and the exhibits identified and prepared by Mr. Mudd and testified to by him are identified as Petitioners' Exhibits Nos. 1 to 10, found in Vol. I of the record from pages 259 to 296.*

* Lest the identification of exhibits should prove confusing, the following explanation is made: The appellants here were respondents before the Secretary and the exhibits offered by them before the Secretary are known as Respondents' Exhibits. The exhibits offered by the Government before the Secretary are known as Government Exhibits. No exhibits were offered by the Secretary at the hearing before the Court. The exhibits of the present appellants, petitioners in the District Court, are identified as Petitioners' Exhibits.

There are not discussed in this Brief any cases which hold that rates fixed by an administrative body which are not sufficient to provide a reasonable return, or which require the rendering of a service for less than cost, are confiscatory and take property without due process of law. Nor is it necessary to discuss those cases which decide that the right to engage or remain in an occupation or business is subject to protection under the Constitution of the United States is as much his as the right to enjoy and own property and the use thereof. The applicable cases are cited under "Propositions of Law".

The effect upon commissions received is shown by Exhibit 1 to bear no relationship to whether an individual firm has a large or a small volume of business. Alexander Conover & Co., a large firm, shows a reduction of 20.09 per cent; John Clay & Co., another large firm, shows a 22.79 per cent reduction. A small firm, Louis Ambrecht Com. Co., shows a reduction of 26.98 per cent. And the firm of Adams, Corrick & Hatch, which may be denominated a middle-volume firm, would have its commissions reduced 23.06 per cent.

The percentage reductions vary from 14.09 per cent to 26.98 per cent; and both extremes are for small firms. One of the larger firms, McCausland, Hoag & Vaughan, also shows a 26.98 per cent reduction.

It is, therefore, apparent that the effect upon the respective businesses has no relationship to size or volume. Hence when the Secretary says in his Answer that the services of the appellants are necessary, but not the services of all of them, his attempt to eliminate what he calls inefficient firms has not worked out as he contemplated.

Petitioners' Exhibit 2 (R. Vol. I, pp. 266-273; discussed

in the testimony, Vol. I, pp. 216-221) is a statement of commissions, costs, and profit or loss under old rates and under the Secretary's rates for the years 1932, 1933, and the first four months of 1934. This comparison is made by the application of the Secretary's rates to the livestock received for those periods.

The group of middle columns headed "Costs" shows the costs in two manners. The four columns headed "Excluding Appraisals" shows costs incurred with no adjustment for salary appraisal.* The costs shown are the actual costs incurred; not the costs found to be reasonable by the Secretary. (No attempt is made to show that the Secretary's rates do not provide income in excess of the Secretary's allowed costs.)

The costs also are shown as including salary appraisal adjustments* so that a complete picture may be given.

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* Salary appraisal adjustments were made necessary by reason of the fact that 56, or 29 per cent of the 193 owners, did not carry themselves on the books of account at any salary whatever. In the case of other owners, they carried themselves at nominal salaries or on a drawing account. It was obvious therefore that in order to arrive at correct and consistent costs, reasonable amounts for the value of owners' services would have to be determined. This was done by the appointment of an Appraisal Committee consisting of five competent but disinterested men not engaged in the livestock commission business but acquainted with it. In making these appraisals, the committee considered the personal and business experience record of each owner, his known managerial and salesmanship ability, and records of the volume and value of business handled by the respective firms. The committee was instructed not to give any weight whatever to "business-getting" ability, or the so-called "following" which might attach to the owners.

The Government's accountant, on the other hand, in his attempt to rectify the omitted-cost situation, assumed in those cases where the owners had not carried themselves on the books at any salary whatsoever, that it would be proper to allow as a substitute therefor, whatever amounts of profits these owners had drawn during the year.

Where no profit nor salary was shown for an owner, there was not included any compensation for that owner, although the owners rendered services (R. Vol. II, p. 648). As an illustration of the reason why the petitioners could not accept the Government's method, the following tables

The "Profit or Loss" columns comprise four categories:

1. Present commissions excluding appraisals.
2. Present commissions including appraisals.
3. Secretary's commissions excluding appraisals.
4. Secretary's commissions including appraisals.

We discuss the 3rd bracket only, namely, the profit or loss under the Secretary's rates *without any adjustment of actual costs for any firm whether or not the owners drew a salary or made a profit or neither.* The comparison, therefore, is to determine profit or loss between commissions which would have been received under the Secretary's rates and costs actually paid, with no adjustment whatsoever.

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will group together those owners who were given the same appraisal by the committee, and these will be compared with the "profit" allowed in costs by the Government's accountant as a substitute therefor; and in other cases the Government's profit-salary substitutes of similar amounts will be grouped together and compared with the appraisal committee ratings:

Firm No.	Man No.	Appraisal Committee Ratings	Government's Profit—Salaries
35	1	$6,000.00	$5,907.93
74	1	6,000.00	3,370.57
8	2	5,000.00	3,985.65
79	1	5,000.00	1,874.78
64	1	4,000.00	4,792.84
91	1	4,000.00	1,567.34
79	2	3,500.00	1,874.27
82	1	3,500.00	3,713.80
12	1	3,000.00	35.12
84	1	3,000.00	3,754.58
47	1	3,000.00	1,285.28
16	2	3,000.00	529.77
9	1	3,000.00	4,907.88
48	1	18,000.00	5,777.83
35	1	6,000.00	5,907.93
19	3	10,000.00	5,300.66
9	1	3,000.00	4,907.88

These are illustrations drawn from respondents' Exhibit No. 12, and show the consist of Government cost figures from which their conclusions as to reasonable costs were calculated in some unknown fashion which they are unwilling to disclose.

This calculation in simple arithmetic shows that under the Secretary's rates

In 1932 two firms would have made a profit*
In 1933 five firms would have made a profit**
In 1934 (four months) six firms would have made a profit***

Considering all of the appellants in the aggregate as reflecting the market as a whole, there would have been losses on the same basis of comparison, Secretary's rates against costs excluding appraisal adjustments, as follows:

1932 ..... $546,509—19.33%
1933 ..... 344,231—12.94%
1934 (4 months) ..... 96,180—11.91%
(Sheet 8 of Exhibit 2, R. Vol. I, p. 273)

Petitioners' Exhibit 4 (R. Vol. I, p. 277), discussed by the witness (R. Vol. I, pp. 227-229) shows graphically what Exhibit 2, last discussed, shows in actual figures. The exhibit is a comparison of the commissions per head for the year 1932, 1933 and the first four months of 1934 under the old rates and under the Secretary's rates with the cost per head, including compensation for owners, that is, salary appraisal adjustments.

Petitioners' Exhibit 6 (R. Vol. I, pp. 283-285) discussed by the witness (R. Vol. I, pp. 230-239) compares graphi-

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* 1932
(1) Merrion & Wilkins, $7,677, to be divided between two owners. (Sheet 5 of Exhibit, R. p. 270.)
(2) Schroeder Live Stock Com. Co., $963, one owner. (Sheet 7 of Exhibit, R. p. 272.)

** 1933
(1) John Clay & Co., $16,123, four owners. (Sheet 2, R. p. 267.)
(2) Merrion & Wilkins, $3,879, two owners. (Sheet 5, R. p. 270.)
(3) National Live Stock Com. Co., $4,359, a corporation. (Sheet 5, R. p. 270.)
(4) Northwestern Live Stock Com. Co., $2,962. (Sheet 5, R. p. 270.)
(5) Schroeder Live Stock Com. Co., $673, one owner. (Sheet 7, R. p. 272.)

*** 1934, four months.
(1) Barton, Looney & Co., $357. (Sheet 1, R. p. 266.)
(2) Conklin Bros. Com. Co., $459. (Sheet 2, R. p. 267.)
(3) Kuenster Live Stock Com. Co., $1,394. (Sheet 4, R. p. 269.)
(4) McCausland, Hoag & Vaughan, $1,144. (Sheet 4, R. p. 269.)
(5) Miller, White & Woods, $112. (Sheet 5, R. p. 270.)
(6) North Western Live Stock Com. Co., $108. (Sheet 5, R. p. 270.)

cally the profit or loss under the present rates (top, heavy line) with the profit or loss under the Secretary's rates (bottom line). The supporting figures are taken from Petitioners' Exhibit 2 and the costs upon which profit or loss are computed for Exhibit 6 including salary appraisal adjustments. Near the middle of each of the three sheets of Exhibit 6 is the zero line. The exhibit shows that if salary appraisal adjustments to secure compensation to owners are included in costs, that nearly all of the firms lost money in 1932 under the old rates. The Secretary proposes further reductions, the effect of which would have increased the losses of 11 per cent in 1932 to 30 per cent under the Secretary's rates (See vertical column entitled "all" at the right-hand sheet of Exhibit 6). In 1933 the losses would have been increased from 3 per cent to approximately 24 per cent; and in the first four months of 1934 from 2 per cent to approximately 23 per cent. (See right-hand column "All" on Sheets 2 and 3 of Exhibit 6.)

In Exhibit 6, the numerals at the top of the pages represent individual firms by the same numbers by which they were identified before the Secretary. The same is true of Exhibit 4 and likewise of Exhibit 7. The exhibits show not only aggregate figures but the figures for each firm individually.

Petitioners' Exhibit 7 (R. Vol. I, pp. 286-288) discussed by the witness (R. Vol. I, pp. 239-241) is a comparison of owner's salaries plus profit or less loss under old rates, with owner's salaries plus profit or less loss under the Secretary's rates for the year 1932, 1933 and the first four months of 1934. Every point below the zero lines on each of the pages of the exhibit shows that the owner not only would get no salary and no profits but would have to pay employees out of pocket. As an example, take Firm 2 for the year 1932, shown on Sheet 1 of the Exhibit (R. Vol. I,

p. 286). Under the rates in effect during that year, the three owners of that firm received in salary and profits $9,871 (Top, heavy line in Column 2, Sheet 1). On the same basis and for the same year, the same three owners would have received $3,983 under the Secretary's rates (bottom light line), or a little over $1300 a piece as both salary and profit. These three owners devoted their entire time to the business and handled over $1,000,000 worth of live stock (R. Vol. I, p. 240).

In the case of Firm No. 4 on Exhibit 7, for the year 1933 (Sheet 2), under the Secretary's rates each owner would have received approximately $4300 as salary and profit and that firm during that year handled live stock for shippers valued at over $7,000,000 (R. Vol. I, p. 240). Firm No. 16, had the Secretary's rates been in effect in 1932, would have been unable to pay its owners anything. Instead they would have had to pay into the business $4,735 to pay salary and other expenses (R. Vol. I, pp. 240-241).

The examples in the preceding paragraph could be multiplied at length. They are not special instances, but only illustrations of a general condition as shown by the exhibit.

Before the District Court, the Secretary criticized the appellants' court exhibits generally on the ground that they did not compare income with costs held to be reasonable by the Secretary. If confiscation is to be found only by a comparison of the Secretary's costs with income under the Secretary's rates, there is no law suit left; and hence, to criticize the exhibits because they include expenses admitted by the Secretary to be unreasonable, is to evade rather than to meet the issues of this litigation.

The objections which the Secretary makes as to costs are: first, in respect to salary appraisal adjustments; and second, in respect to every other item where the actual costs are in excess of those found to be reasonable by the

Secretary. If compensation is due to owners who neither carry themselves on the books with either a salary or drawing account and who make no profits, salary appraisal adjustments must be included in costs. The costs as figured by the Government did not show any compensation for the owner even though he is admitted to have rendered service where the books showed no profit or salary for the owner (R. Vol. II, p. 648). Furthermore, in the preceding pages in this Section wherein Petitioners' Exhibit 2, showing Profit or Loss is discussed, the costs both include and exclude salary appraisal adjustments and the figures referred to in the discussion are, without exception, on the basis of the exclusion of salary appraisals.

Referring to the other criticism of the Secretary that the remaining items of cost are not those found reasonable by the Secretary, this criticism palpably begs the question about which this law suit centers, namely, the inadequacy of the costs allowed as reasonable by the Secretary and their lack of relationship to the normal, actual experience of the market.

Petitioners' Exhibit 10 (R. Vol. I, p. 295, discussed by the witness, R. Vol. I, pp. 249-250) was prepared to show that even if smaller volume firms were eliminated, there would be no substantial effect on costs or on profit. The Government's answer states that the services of the appellants are necessary, but not the services of all of them. In the Exhibit, the witness has eliminated all firms selling less than 200 cars of live stock unless they handled more than 100 cars of the most valuable live stock, cattle. The exhibit gives the number of each species of livestock handled by each firm for the year 1932, followed by commissions received and the per cent of profit or loss. The four right-hand columns of the exhibit show the allotment of the business of the small firms to the large firms in the proportion

which the volume of each of the large firms bears to the total volume. For instance, Firm No. 2 has $289 added to its 1932 commissions, thereby increasing its total commissions by that amount, and thereby decreasing its losses by an equal amount and its per cent of loss from 9.33 per cent to 8.31 per cent.

The elimination of the small firms entirely, those who receive less than 200 cars of livestock or more than 100 cars of cattle (small firms), is shown by the experience of each firm and by the fact that the average loss would be decreased only 1½ per cent, that is, from 9.51 per cent to 7.99 per cent. Of this exhibit the witness said (R. Vol. I, p. 249):

> "in order to indicate the effect on costs and on rates, I have eliminated the small firms because it has been indicated that the small firms might be responsible for high rates, because they are too small to operate efficiently, and would therefore have to have higher rates in order to pay their way".

And again the witness said:

> "But in order to make the illustration extremely favorable to the contention that the eliminating of these small firms would affect the costs and rates materially, I have considered that this business could have been handled by the larger firms without any additional expense whatsoever". (R. Vol. I, p. 250).

Confiscation is a question both of fact and of law. In this case, both law and facts are clear. When, upon a basis of actual cost only 2 firms would have made any profit under the Secretary's rates in 1932; only 5 in 1933; and only 6 in the first four months of 1934, while all the rest of the appellants would have suffered losses, there is a clear demonstration that the prescribed rates are unjust, unreasonable and confiscatory.

The appellants have fulfilled every requirement to show that the rates prescribed by the Secretary do not return actual and necessary costs and are, therefore confiscatory as to each appellant considered individually.

The Government contended before the District Court that the petition and complaint made out no case of confiscation and that even if evidence were admissible upon that issue, there being no such issue made, there was no occasion to introduce evidence in support thereof. The Government based its contention upon the assertion that aggregate computations of the experience of all of the petitioners taken together to show confiscation were irrelevant and immaterial, citing in support thereof the case of *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440. The Bill charges in Paragraph 27(e) that:

> "The rates and charges ordered into effect by said Order and said Supplemental Order are individually and severally confiscatory as applied separately to cattle and calves, swine, and sheep or goats; and each and all of said rates will fail to yield to the petitioners and to each petitioner a fair and compensatory return for stockyard services rendered by the petitioners and by each petitioner * * *." (R. Vol. I, p. 22)

Again, in Paragraph 28, it is specifically alleged on behalf of each petitioner that the orders of the Secretary will deprive each of them of their property and business without due process of law. (R. Vol. I, p. 26)

To make the allegation more specific and emphatic, Paragraph 28(a) was added by amendment to the Petition and Complaint by order of Court entered June 12, 1934. (R. Vol. I, p. 209) The amendment is as follows:

> "Each petitioner on his or its own behalf charges that the facts alleged in the foregoing paragraphs as to market experiences apply to his or its own business without substantial variation from the market experiences; that his or its own business is conducted

economically, efficiently and at reasonable costs and with the exercise of sound business judgment as to costs and expenditures; that the rates, charges and practices prescribed by said Order and said Supplemental Order, if permitted to become effective and if enforced, will deprive him or it of his or its property and business without due process of law, and will deny to him or it the equal protection of the laws in violation of his or its rights under the Constitution and laws of the United States; and that the said Order and Supplemental Order are without warrant and authority of law and if put into effect and enforced will confiscate his or its property and business without due process of law and in violation of the rights guaranteed by the Constitution and laws of the United States." (R. Vol. I, p. 209)

The joining of all the petitioners in one action is established practice both under the Interstate Commerce Act and under the Packers and Stockyards Act, 1921. Under the former act, in the case of *Missouri K. & T. R. Co.* v. *Interstate Commerce Commission*, 164 Fed. 645 (C. C. Mo.), fifty-one railway companies and their receivers asked to have an order of the Interstate Commerce Commission annulled and its enforcement enjoined on the ground that the rates prescribed therein were unreasonably low and confiscatory.

Under the Packers and Stockyards Act, the *Tagg Bros.* case, 280 U. S. 420, 74 L. Ed. 524, is authority. In that case, fifty-eight market agencies joined as plaintiffs. Certainly the Court will not require over one hundred and fifty separate suits to be brought in order to determine the validity of the Secretary's Order and Supplemental Order in this suit.

Not only does the Bill of Complaint make the specific allegation that the Order and Supplemental Order prescribed by the Secretary, if enforced, will deprive each petitioner of its property and business without due process

of law, but the proofs offered are specific as to each petitioner as to costs, returns and every other pertinent factor. To provide a factual foundation in the Bill of Complaint for the charges of confiscation made, it is alleged, Paragraph 28, that the facts alleged in the foregoing paragraphs of the bill as to the market experiences apply to the individual business of each petitioner without substantial variation. The proofs made show that allegation to be accurate. It is alleged, for instance, Paragraph 27(c) that if the rates prescribed by the Secretary had been in effect in 1932, a reduction of 25.47 per cent in gross selling commissions would have resulted, increasing the loss of 9.56 per cent actually suffered under the present rates to 32.59 per cent under the Secretary's rates. (R. Vol. I, p. 21.)

Paragraph 27(d) and (e) (R. Vol. I, pp. 21-22) alleges that the costs figured by the Secretary to be reasonable are less than actual costs of each petitioner. Paragraph 28(a) charges actual losses suffered by all of the petitioners. Paragraph 27(m) alleges that in some instances the reasonable costs of selling as found by the Secretary were more than the commissions allowed and Paragraph 27(n) alleges that the Secretary found the reasonable costs for the sale per head of cattle and calves was 42.97c and that the petitioner whose business was conducted most economically entailed an actual cost of 57.91c. In the same paragraph, similar allegations are made in the case of hogs and in the case of sheep. These specific allegations, among others, it is alleged, apply equally to each and all the petitioners as well as to all of them in the aggregate. (R. Vol. I, pp. 24-25.)

The bill of complaint in this cause charges that the returns under the Secretary's rates would be less than the cost of doing business for each petitioner and that the business of each petitioner is conducted economically, efficiently

and at reasonable cost and with the exercise of sound business judgment. Such allegations charge confiscation in the only way that it can be charged except by pleading evidence as, for example, that Petitioner A had costs of $1200 and an income of $1000 and that the $1200 was reasonably expended.

The allegations as to confiscation in the Bill are modeled after the allegations in the *Illinois Bell Telephone case*, 292 U. S. 151, 78 L. Ed. 1182, decided April 30, 1934.

The defendants quote the case of *Aetna Insurance Co. v. Hyde*, 275 U. S. 440. That case decided and under the pleadings could decide but one point, namely, that rates of insurance policies fixed by state authority on the basis of aggregate collections, could not be attacked under the Fourteenth Amendment upon the ground that they were confiscatory as to any one company. The statute of Missouri involved, authorized the fixing of rates upon a study of the aggregate profit of fire insurance companies. The statute permitted a review in the Missouri courts of the findings of the rate-making body upon the same basis, namely, the aggregate collections. As the Court says in its opinion (p. 446) the Superintendent of Insurance of Missouri was not authorized to determine as applied to any single company, whether the rates would be just and reasonable. The statute required *en masse* consideration. The review was necessarily confined to the same consideration. The plaintiff companies could not and did not claim upon the review permitted them, that on behalf of any company the reduced rates would be too low to permit that company to make a reasonable profit. The Supreme Court of the United States said that it had no jurisdiction since the Fourteenth Amendment did not reach the situation for the Missouri statute did not authorize a determination of the reasonableness of rates when applied to the business of any company.

Hence the Court was not called upon to determine whether the Order would operate to deprive any company of its property without due process of law. The suit was treated as one to obtain the review provided for by the Missouri statute. No federal question being presented, the writ of certiorari was dismissed.

To have complied with the suggestions and contentions made by the defendants, the 161 respondents before the Secretary of Agriculture would have had to file 161 separate suits; prepare as many copies of the voluminus record before the Secretary; and have secured 161 injunctions with the issuance of writs thereon. This is not the efficiency and economy for which the defendants contend in their brief. The Secretary sued all of the appellants at once. It is only fair that they all join in suing him.

The record itself is the answer to the defendants' charge that specific proofs as to each plaintiff have not been made. Attention is called to the exhibits showing the specific figures for each concern.

VI.

THE APPELLANTS WERE ENTITLED TO A TRIAL DE NOVO IN THE DISTRICT COURT BOTH ON THE ISSUE OF CONFISCATION AND ON THE ISSUE OF THE DENIAL OF PETITIONS FOR REHEARING.

The Government objected to the introduction of any evidence before the District Court on the ground

> "that the case was before the court solely on the record before the Secretary of Agriculture." (R. Vol. I, p. 211.)

The court admitted the evidence subject to objection

> "so that in case what we decide is reviewed by the Supreme Court, they will have it all there." (R. Vol. I, p. 212.)

The appellants' position is that in cases brought to en-

force constitutional rights, particularly on an issue of confiscation, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that function. Further, it is the position of the appellants that the Secretary's denials of the petitions for rehearing prevented the appellants from presenting important evidence as to changed economic conditions, diminution in volume of receipts, increasing expenses, acceleration of the percentage of truck arrivals and the like, which evidence could not have been brought to the Secretary's attention at the time of the hearing before him for it did not exist at that time. The evidence sought to be introduced by the petitions for rehearing is, in essence, like new matter arising after the entry of a decree. The Secretary would not hear the evidence and he now contends that the Court should not hear it. He would deny to the appellants all opportunity to prove the effect upon their business, severally and jointly of his orders and the changed conditions which confront the appellants in the conduct of their business.

This Court has indicated the proper procedure to be followed by parties in the decision of appellants in the *Tagg* case, 280 U. S. 420, 444. The Court said:

> "Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his Order if new evidence warrants the change".

In the case at bar, the appellants followed the practice laid down by this Court and sought to have the Secretary consider the additional evidence on rehearing. This the Secretary twice refused to do. Justice requires, therefore, that the review of the decision of the Secretary should not be narrowed by the act of the Secretary in refusing to consider the additional evidence.

On the question of the admissibility of evidence on an issue of confiscation, the parallel between the Interstate Commerce Commission Act and the Packers and Stockyards Act is germane. Each act is an administrative one passed by common legislature. Each is applied by an administrative body; the orders of neither the Commission nor the Secretary are self-executing, but require resort to the courts; precisely the same language is employed in each act; and the same procedure, original and appellate, provided for in suits for injunction against orders of the Interstate Commerce Commission are made applicable to the Packers and Stockyards Act.

The Interstate Commerce Commission Act was amended in 1906 (Chap. 3591, Section 5, 34 Stat. at L. 591) and again in 1910 (Chap. 309—Section 13, 36 Stat. at L. 555). One of the general effects of these amendments has been that the courts did give greater effect to the orders of the Commission. Prior to these amendments, the practice when an order of the Commission was challenged, was for the courts to afford a trial *de novo* upon the merits and for the courts to hear and determine the cause on

> "not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy." (*Kentucky & Indiana Bridge Co.* v. *L. & N. R. R. Co.* 35 F. 567.)

See also:

I. C. C. v. *C. B. & Q. R. Co.* 94 F. 272, 274.
I. C. C. v. *Alabama Midland R. Co.* 168 U. S. 144, 174.
Cincinnati, etc. Ry. v. *I. C. C.* 162 U. S. 184.
Texas & Pacific Ry. v. *I. C. C.* 162 U. S. 197.

Even after the amendments of 1906 and 1910 to the Interstate Commerce Commission Act, the right and the practice to hear additional evidence has been upheld. In *Mis-*

souri K. & T. R. R. Co. v. *I. C. C.* 164 F. 645, an application was made to the Circuit Court of Missouri to restrain an enforcement of the Commission. The *per curiam* opinion of Judges Van de Vanter, Hook and Adam, said:

> "It is not conceived that the scope of the inquiry which the court is authorized to make, or the effect to be given to the commission's finding or determination upon which its order is based, is intended to be in any wise different when the suit is one to annul or enjoin the enforcement of the order than when it is one to enforce obedience thereto." (649)

It thus appears that the same rule as to the taking of further evidence applies whether the application is for the enforcement or for the restraint of the order of the Commission. The opinion of the court continues:

> "It is not intended that the hearing in such a suit, whether it be of one kind or the other, shall be confined to an ascertainment of what was determined by the commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but, on the contrary, the hearing may be *de novo*, and may include the taking and consideration of evidence other than that before the commission."

Upon another phase of the instant suit, the case just cited has a further significance in that the suit was brought by fifty-one railway companies to annul and enjoin the enforcement.

In *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, (1912), there was again an application to restrain the enforcement of a reduction in rates. From the decision it appears that the case was referred to a Master for the taking of testimony and that he made findings which were approved by the Circuit Court. No objection was raised by the Supreme Court to this procedure. Again, in *Manufacturers Ry. Co.* v. *Interstate Commerce Commission*, 246 U. S. 457, the evidence produced (four principal witnesses) before the District

Court, was considered and discussed by the Supreme Court. The evidence bore upon the issue of confiscation.

The statute providing a method for restraining the enforcement of execution of orders of the Secretary of Agriculture (Section 47, Title 28 U. S. C.) provides for application to a District Court the judge of which shall call to his assistance two other judges

"to *hear* and *determine* the application".

The statute refers to

> "the *hearing* upon such application for an interlocutory injunction shall * * * be assigned for a *hearing*".

The statute concludes with this clause

> "upon final *hearing* of any *suit* brought to suspend or set aside, in whole or in part, any order of said commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply".

It might be argued that in respect to the application for a temporary stay or interlocutory injunction, the words *hear* and *hearing*, are not used in their ordinary sense but refer rather to the submission of the motion for temporary stay or interlocutory injunction as in the case of Section 129 of the Judicial Code (Section 27, Title 28, U. S. Code) permitting appeals from orders granting or denying applications for interlocutory injunction, if it were not for the fact that the concluding clause of the statute provides for a

"final *hearing* of any *suit* brought to suspend" etc.

This language of the concluding clause, namely,

"final *hearing* of any *suit*"

can have but one meaning, namely that which has attached to the word *hearing* ever since English chancery began. It includes the introduction of evidence as well as arguments of counsel. *American Grain Separator Co.* v. *Twin City Separator Co.* 202 F. 202 (C. C. A. 8), opinion by Judge

Sanborn. A hearing in equity is the trial of a case including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor. The word *hearing* means the same thing in an equity suit that the word *trial* does in cases at law. 21 C. J. 578.

The statute does not refer to nor provide for a hearing upon review upon a record already made, but it provides for the institution of a suit and the hearing thereof. This has been the interpretation of the statute in respect to proceedings which attack an order of the Interstate Commerce Commission, as we have shown above; and there is no reason to interpret the same statute differently when the proceedings of another administrative body are challenged.

A question arose, however, in the case of *Tagg Bros. & Moorhead* v. *U. S.* 280 U. S. 420, 74 L. Ed. 524. This is the principal, and as far as we have been able to find, the only case supporting the Government's contention in any measure that additional evidence was not admissible at the trial of this suit. And in that case by its own specifically stated limitation, the court did not pass on the question of admissibility when constitutional questions are involved.

The *Tagg case* arose under the Packers and Stock Yards Act and was a suit brought by fifty-eight concerns joined as plaintiffs against the Secretary of Agriculture to restrain the enforcement of a certain order of the Secretary. Upon the filing of an answer, a Special Master was appointed to hear the evidence and report his conclusions to the court. The Master admitted, in addition to the record made before the Secretary, oral evidence, which evidence the District Court held admissible. The report shows that the District Court justified the admission of the evidence and considered the same on the ground that the notice of hearings before the Secretary did not advise the plaintiffs

that the Secretary intended to fix a new schedule of rates (p. 443). The Supreme Court, however, held the notice to be adequate and that if it were not adequate, the Secretary's Order should have been set aside without inquiry at all into its merits (p. 443).

It was this situation which caused the court to say (443):

> "A proceeding under Sec. 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now."

The Court expressly said

> "The question of the admissibility of the additional evidence on the issue of confiscation may, therefore, be passed, and it is passed, without decision". (445)

The Court in questioning the admissibility of evidence, cited a number of cases which are analyzed below:

1. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

In this case, the Supreme Court of Pennsylvania was reversed because no opportunity had been provided by the state law for submitting the question whether rates are confiscatory to the determination of a judicial tribunal upon its own independent judgment as to both fact and law (Opinion, p. 289).

2. *Prendergast* v. *New York Tel. Co.* 262 U. S. 43.

This was an appeal from an order of the District Court temporarily enjoining the enforcement of orders of the Public Service Commission of New York upon the ground that the rates prescribed were confiscatory. The plaintiff did not offer, upon the application for the injunction, the

evidence taken before the Commission, but did submit evidence in the form of affidavits to prove that the rates prescribed would be confiscatory. The commission complained that the plaintiff had not offered the evidence taken before the Commission but this contention was overruled. That is the only question of evidence involved in the Prendergast case.

3. *Liscio* v. *Campbell*, 34 F. (2) 646 (C. C. A. 2).

The only necessary holding in this case was that the plaintiff, under the statute, was not entitled to an *ad interim* permit from the Court. Upon his application to the Court, plaintiff offered in evidence the proceeding before the administrator. The court determined the hearing upon the proceedings had before the administrator, this without objection from the plaintiff. The gratuitous language of the court as to the scope of final hearing was not upon any contested issue.

4. *L. & N. R. R. Co.* v. *United States*, 245 U. S. 463.

This was a suit by a railroad to set aside an order of the Interstate Commerce Commission. The principal contention was that the order complained of was not responsive to the application which had been made to the Commission in respect to long and short haul rates. Some of the errors assigned related to the admission of evidence by the Court. The Supreme Court held the evidence inadmissible on two grounds: First, it was inadmissible because of its character; second, on the issues presented, namely, whether the Commission's order was responsive to the application, the authority for the order would have to be determined upon the evidence introduced before the Commission (P. 466).

The question raised in the *Tagg case* was definitely settled by the Supreme Court in *Crowell* v. *Benson*, 285 U. S.

22. The suit was brought in the District Court to enjoin the enforcement of an award made by United States Employee's Compensation Commission against Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act. The District Judge granted a hearing *de novo* upon the facts and law, expressing the opinion that the Act would be invalid if it did not permit such a hearing (37). The questions involved were whether the beneficiary of the award was an employee of Benson; and the constitutional questions as to whether the act violated the due process clause of the Fifth Amendment, and whether the act violated the provisions of Article 3 of the constitution with respect to the judicial power of the United States. We quote first the ultimate holding of the Supreme Court (65):

> "We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment. Upon that issue the witnesses who had testified before the deputy commission and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts but to pass upon the question of principle."

In the Court's opinion and commenting upon the constitutional questions involved, particularly the proper exercise of the judicial power of the United States in enforcing constitutional limitations, the Chief Justice said (60):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact."

In support of this pronouncement, it is significant that the court relied not only on the *Tagg case*, 280 U. S. 420,

74 L. Ed. 528, here relied upon by the Government; but also upon *Ohio Valley Water Co.* v. *Ben Avon,* 253 U. S. 287, 64 L. Ed. 908, and *Prendergast* v. *New York Telephone Co.* 262 U. S. 43, 67 L. Ed. 853, both of which were relied upon in the *Tagg case.*

Further, the Court said (60-61):

> "In the present instance, the argument that the Congress has constituted the deputy commissioner, a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when the fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.' "

Further the Court said (64):

> "We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

In the District Court on the question of the admissibility of the additional evidence, in addition to the *Tagg* case, counsel for the Secretary cited *I. C. C.* v. *Union Pacific R. R. Co.,* 222 U. S. 541; *Farmers' Live Stock Commission Co.* v. *United States,* 54 F. (2) 375, and *Union Stock Yards Co.* v. *United States,* 9 F. Supp. 864.

Each of the cases is upon the point of the weight to be given to the findings of an administrative agency; and have no pertinency upon the question of admissibility of additional evidence.

Whether an order prescribing rates is confiscatory, can-

not be determined until the order is published. Until the Secretary entered his orders, appellants had no way of knowing what the rates would be nor what findings the Secretary might make in respect to costs. In a system of jurisprudence which is prized for its equity and fairness and in which any litigant is entitled to a full and impartial hearing, without issues having been prejudged against him, the contention that an issue of confiscation must be determined upon a record made before the challenged rates are prescribed is directly contrary to the teachings of the language of this Court in *Crowell* v. *Benson*. Likewise, the contention of the Secretary forgets the admonition of the Court, in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 218, that one is not compelled to come to court on the issue of confiscation with the facts already found against him.

In *Denver Union Stock Yard Co.* v. *United States*, 57 F. (2) 735, the Court admitted evidence of the kind and character offered by the appellants in the District Court, and in support of such admission relied in part upon *Crowell* v. *Benson*, 285 U. S. 22.

In *Manufacturers' Railway Co.* v. *United States*, 246 U. S. 457, 489, this Court said:

> "It is true that so long as the Commission proceeds in accordance with the requirements of the Commerce Act and its amendments, and with proper regard for constitutional restrictions, its administrative orders, not calling for the payment of money, if made after due hearing and supported by evidence, are not subject to attack in the courts. This, as we have seen, results from the provisions of §§ 15 and 16 of the act as amended. *Interstate Commerce Commission* v. *Illinois C. R. Co.* 215 U. S. 452, 469, 470, 54 L. ed. 280, 287, 288, 30 Sup. Ct. Rep. 155; *Interstate Commerce Commission* v. *Union P. R. Co.* 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; *Procter & G. Co.* v. *United States*, 225 U. S. 282, 297, 298, 56 L. ed. 1091, 1096, 1097, 32 Sup. Ct. Rep. 761; *Interstate Commerce Com-*

mission v. *Louisville & N. R. Co.* 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185. But these cases recognize that matters of constitutional right are not to be conclusively determined by the Commission; and we are not prepared to say that a party is debarred from attacking an order of the Commission upon constitutional grounds even though they were not taken in the hearing before that body."

In this case, the appellants have conformed to the procedure suggested by this Court in *Tagg* case. They not only filed one, but two petitions for rehearing. After the denial of the second petition, the appellants took the only course open to them—they applied to the Court. To have it said that the District Court and this Court is to be limited to an examination of only evidence heard by the Secretary but that evidence which he had an opportunity to consider, but refused, is not admissible, is to deprive the appellants of any means whatsoever of protecting themselves. The review of the decision of the Secretary to be effective must be a consideration not only of that which the Secretary did, but also of that which he refused and failed to do.

Conclusion.

Under the heading "Propositions of Law" the appellants have cited the cases pertinent to the issues here involved and which enunciate the principles of law which govern this case. Primarily the argument has been one of fact.

The Packers and Stockyards Act, 1921, was designed to prevent any evil. As stated by Chief Justice Taft in *Stafford* v. *Wallace*, 258 U. S. 495, 514, in speaking of the Act:

> "The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys."

The Act was regulatory. It did not contemplate, and constitutionally could not have contemplated, that the Secre-

tary of Agriculture should not only regulate packers, stockyards, and market agencies, but with dogmatic order regiment every item and element of cost of the business of a market agency at a figure which bears no relationship to the actual experience of the market. If the Secretary followed in the instant case the method of arriving at the costs and rates employed in the *Tagg Case*, the results of the application to the facts in this record brought such entirely different results that they cannot be justified. Costs held to be reasonable in the *Tagg Case* bore an adequate relationship to costs actually incurred. Particularly in respect to salesmen's salaries the Government spoke of the salaries allowed as "approximately the maximum market value of salesmanship". In the instant case the Secretary stated that the fair test of what salesmen can be purchased for is the result of bargaining on the open market; and yet the reasonable price which he awards to be paid to salesmen for each species of livestock is from $500 to $1,000 less than the average, rather than, as in the *Tagg Case*, the maximum market value.

If the Orders complained of were for fixing the wages of a railroad company or any other public utility, the rates prescribed in such Order would be based upon actual costs. Labor has the right to bargain either individually or collectively. Exactly the same conditions obtain in this suit.

Rates and charges prescribed have no relationship to actual experience. There is no evidence in the record of wasteful or extravagant expenditures. Indeed, witness after witness testified to the reduction of expenses in 1931, 1932, and 1933 by reductions in expenditures for salaries and other items of expense and through reduction in personnel of an organization, or both; and the Secretary so found (R. Vol. I, p. 127).

The results of the rates and charges and costs prescribed by the Secretary speak for themselves. The Secretary's

Orders are the imposition of the personal judgment of the Secretary for that of the owners and managers of the regulated business; and are an attempt legislatively to revise, rather than administratively to regulate, an industry.

The rates prescribed confiscate the business, property and services of the appellants and are unlawful and unconstitutional.

It is submitted that the rates prescribed and the costs allowed as reasonable have no evidence or insufficient evidence in the record to support them; that the judgment of the District Court should be reversed; and that a permanent injunction should issue, restraining the defendants from the enforcement of the prescribed rates.

Respectfully submitted,

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APPENDIX A.

Packers and Stockyards Act, 1921 (Provisions of Act relating to Stockyards and stockyard dealers).

STOCKYARDS AND STOCKYARDS DEALERS.

§ 201. "Stockyard owners"; "stockyard services"; "market agency"; "dealer"; defined. When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyards services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. (Aug. 15, 1921, c. 64, § 301, 42 Stat. 163.)

§ 202. "Stockyard" defined; determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of sections 201 to 217 inclusive of this chapter until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition. (Aug. 15, 1921, c. 64, § 302, 42 Stat. 163.)

§ 203. Registration of stockyard dealer or market agency; penalty for failure to register. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this chapter by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. (Aug. 15, 1921, c. 64, § 303, 42 Stat. 163.)

§ 204. Bond and suspension of registrants. The Secretary of Agriculture may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing the Secretary finds any registrant is insolvent or has violated any provision of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary of Agriculture or a court of competent jurisdiction. (Feb. 10, 1925, c. 200, 43 Stat. 851.)

§ 205. General duty as to services. It shall be the

duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. (Aug. 15, 1921, c. 64, § 304, 42 Stat. 164.)

§ 206. Rates and charges generally; discrimination. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, § 305, 42 Stat. 164.)

§ 207. Schedule of rates; filing and exhibition; change in rates; suspension; penalties. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 202 of this chapter, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the Public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules,

either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may, either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing cannot be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in

the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both. (Aug. 15, 1921, c. 64, § 306, 42 Stat. 164.)

§ 208. Unreasonable or discriminatory practices generally. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, § 307, 42 Stat. 165.)

§ 209. Liability to individuals for violations; enforcement generally. (a) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 205, 206, 207, or 208 of this chapter, or any order of the Secretary made under sections 201 to 217 inclusive of this chapter, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this chapter, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but

the provisions of this chapter are in addition to such remedies. (Aug. 15, 1921, c. 64, § 308, 42 Stat. 165.)

§ 210. Proceedings before Secretary for violations generally; action to enforce order of Secretary. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 205, 206, 207, or 208 of this chapter, or of an order of the Secretary made under sections 201 to 217 inclusive of this chapter, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provisions of sections 201 to 217 inclusive of this chapter, or concerning which any question may arise under any of the provisions of sections 201 to 217 inclusive of this chapter, or relating to the enforcement of any of the provisions of sections 201 to 217 inclusive of this chapter. The Secretary shall have the same power and authority to proceed with any inquiry in-

stituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (Aug. 15, 1921, c. 64, § 309, 42 Stat. 165.)

§ 211. Order of Secretary as to charges or practices; prescribing rates and practices generally. Whenever after full hearing upon a complaint made as provided in section 210 of this chapter, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services; is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed. (Aug. 15, 1921, c. 64, § 310, 42 Stat. 166.)

§ 212. Prescribing rates and practices to prevent discrimination between intrastate and interstate commerce. Whenever in any investigation under the provisions of sections 210 to 217 inclusive of this chapter, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the

law of any State or the decision or order of any State authority to the contrary notwithstanding. (Aug. 15, 1921, c. 64, § 311, 42 Stat. 167.)

§ 213. **Prevention of unfair, discriminatory, or deceptive practices.** (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. (Aug. 15, 1921, c. 64, § 312, 42 Stat. 167.)

§ 214. **When orders effective generally.** Except as otherwise provided in this chapter all orders of the Secretary under sections 201 to 217, inclusive of this chapter, other than orders for the payment of money, shall take effect within such reasonable time not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction. (Aug. 15, 1921, c. 64, § 313, 42 Stat. 167.)

§ 215. **Failure to obey orders generally; punishment.** (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 211, 212, or 213 of this chapter shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General,

to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. (Aug. 15, 1921, c. 64, § 314, 42 Stat. 167.)

§ 216. Court proceedings to enforce orders; injunction. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same. (Aug. 15, 1921, c. 64, § 315, 42 Stat. 167.)

§ 217. Proceedings for suspension of orders. For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, § 316, 42 Stat. 168.)

APPENDIX B.

Provisions of statutes relating to venue, jurisdiction and appeal (from U. S. Code, Title 28).

§ 43. Venue of suits relating to orders of Interstate Commerce Commission. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 44. Procedure in certain cases under interstate commerce laws; service of processes of court. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

§ 45. (Judicial Code, section 209.) District courts; practice and procedure in certain cases. The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in

part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 47. Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction 'shall be

given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

§ 47a. (Judicial Code, section 210.) Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of the court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

APPENDIX C.

Buying Charges.

In addition to selling livestock on a commission basis, there are buying operations. This constitutes a relatively small part of the business at the market. Rather than inject the issues in respect to buying costs and charges in the main part of the brief, they are here treated briefly.

All kinds of livestock are bought on a commission basis. This service is performed by firms who do no buying of livestock for their own account; by those who take title to part of their purchases and re-sell on a commission basis; by firms who maintain a separate personnel for selling; as well as buyers who do nothing but buy livestock on a commission basis.

The order buying firms who do not receive or sell livestock on a commission basis, buy, on order, various kinds of animals for slaughter by meat packers whose plants are located in various parts of the United States. Much of the livestock which is shipped out of the Chicago market is bought on special or standing orders on a commission basis by such order buyers. The buying activities are briefly treated in Paragraphs 60, 61, 62 and 63 of the Secretary's Findings (R. Vol. I, p. 96-97). Feeding and breeding sheep and lambs, cattle, calves and swine are bought by some of the appellants.

The only findings as to buying costs appear at Paragraph 159, 160 and 161 of the Findings (R. Vol. I, p. 181-182). The existing rates are found to be unreasonable and unjustly discriminatory (Par. 168, R. Vol. I, p. 185-188). The order is that

> "The rates for buying livestock of the various species shall not be in excess of those for selling like species."

In Paragraph 159 of Findings (R. Vol. I, p. 181), the Secretary finds in respect to buying costs that they may be more or less than the cost of selling; that the buyer may find it necessary to traverse the entire stockyard in search of livestock suitable for his order, and after such effort may not be able to collect it; that he may be able to fill his order only by purchasing a few here and there; that considerable yard work is involved in assembling livestock and assorting it according to orders; that it becomes necessary to hold livestock bought on order until a sufficient number can be obtained; that there is a wide variation in accounting work entailed in making different purchases; that buying operations require a greater amount of capital than selling operations; that expenditures for getting and maintaining business are greater; and that commission firms who do both buying and selling with the same organization, do not set up any segregations of expenses incurred as between buying and selling.

Except for these general comments, the Secretary made no findings as to what the costs for buying were during 1932; or what the expense was for any buying service.

Hence there is nothing on which to base his order of unreasonableness of existing rates; or his order that charges for buying services should not exceed those for selling. The order is therefore void.